TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 139.

THE AMERICAN SURETY COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

FREDERICK N. PAULY, AS RECEIVER OF THE CALIFORNIA NATIONAL BANK OF SAN DIEGO, CALIFORNIA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MAY 5, 1898.

(16,280.)

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(16,280.)

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BLEED THROUGH

a (No. 2.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The American Surety Company of New York, plaintiff in error, and Frederick N. Pauly, as receiver of the California National Bank of San Diego, California, defendant in error (No. 2), a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed, to operate as a supersedeas on filing bond in $35,000.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

b [Endorsed:] United States circuit court of appeals, second circuit. Filed Apr. 16, 1896. James C. Reed, clerk.

Frederick N. Pauly, as receiver of the California National Bank of San Diego, California, hereby acknowledges due and sufficient personal service of the within writ of error this 17th day of April, 1896.

FREDERICK N. PAULY,
As Receiver of the California National Bank of San Diego, California,
By GEO. M. COFFIN,
Deputy & Acting Comptroller of Currency.
—— ——, *Attorney, and*
By EDWARD MITCHELL, *Attorney.*

(a)

POOR COPY

UNITED STATES OF AMERICA, }
Southern District of New York, } ss

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 287, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The American Surety Company of New York, plaintiff in error, against Frederick N. Pauley, defendant in error (action No. 2), as the same remain- of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this first day of May, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

JAMES C. REED, *Clerk.*

c United States Circuit Court of Appeals for the Second Circuit

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff in Error, }
vs.
FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California, Defendant in Error. }

(Action No. 2.—Collins, president.)

Transcript of Record.

Error to the circuit court of the United States for the southern district of New York.

Printed under the direction of the clerk.

[Stamped :] United States circuit court of appeals, second circuit. Filed May 3, 1896. James C. Reed, clerk.

CITY, COUNTY AND STATE OF NEW YORK, SS.:

WILLIAM C. DOUGLAS, being duly sworn, says: That he is managing clerk in the office of Henry C. Willcox, Esq., attorney for American Surety Company of New York; that on the 3d day of April, 1895, at four o'clock in the afternoon, at the office of Mitchell & Mitchell, No. 44 Wall street, New York City, he served the within writ of error on Mitchell & Mitchell, attorneys for Frederick N. Pauly, as Receiver, &c., by delivering to William Mitchell, of said firm, personally, a true copy of said writ of error, and leaving the same with him.

WILLIAM C. DOUGLAS.

Sworn to before me this 4th day of April, 1895.

JOHN C. MOWBRAY,
Notary Public,
Kings Co.
Ctf. filed in N. Y. Co.

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THE

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

THE UNITED STATES OF AMERICA, Second Judicial Circuit, } ss.:

THE PRESIDENT OF THE UNITED STATES TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in 2
the said Circuit Court before you, or some of you, between Frederick N. Pauly, as Receiver of the California National Bank of San Diego, California, plaintiff, and the American Surety Company of New York, defendant (Action No. 2), a manifest error hath happened, to the great damage of the said American Surety Company of New York, defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and 3
proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Second Circuit, together with this writ, so that you have the same in New York City, in said Circuit, on the 30th day of April next, in the said Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief

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Justice of the United States, this 1st day of April, 1895, and in the one hundred and nineteenth year of the Independence of the United States of America.

Attest:

JOHN A. SHIELDS,
Clerk.

[SEAL.]

Allowed:

E. H. LACOMBE,
Circuit Judge.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 5 to 303 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of American Surety Company, of New York, plaintiff in error, against Frederick N. Pauly, as Receiver of the California National Bank of San Diego, California, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 13th day of April, in the year of our Lord on thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

JOHN A. SHIELDS,
Clerk.

[SEAL.]

(Endorsed)—United States Circuit Court of Appeals for the Second Circuit.—American Surety Company, of New York, Plaintiff in Error, against Frederick N. Pauly, as Receiver, &c., Defendant in Error.—Action No. 2.—Writ of Error.—Henry C. Willcox, Attorney for Plaintiff in Error, No. 160 Broadway, New York City, N. Y.—Due and sufficient service of a copy of the within Writ of Error is hereby admitted this 3d day of April, 1895.

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UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California,
Plaintiff,

AGAINST

AMERICAN SURETY COMPANY OF NEW YORK,
Defendant.

Action No. 2.

TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the City of New York, this 8th day of May, in the year one thousand eight hundred and ninety three.

JOHN A. SHIELDS,
Clerk.

[L. S.]

MITCHELL & MITCHELL,
Plaintiff's Attorneys.
Office and Post Office address,
45 and 47 Wall Street,
New York City.

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10 UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California,

Plaintiff,

AGAINST

11 AMERICAN SURETY COMPANY OF NEW YORK,

Defendant

Action No. 2.

The plaintiff above named, by Mitchell & Mitchell, his attorneys, complaining of the defendant herein, respectfully shows to this Court on information and belief:

I.—That at the times hereinafter mentioned up to about the 18th day of December, 1891, the California National Bank of San Diego, California, was a banking institution duly organized and existing under an act of Congress of the United States, com-
12 monly known as the National Banking Act, and acts amendatory thereof, and was a bank of discount and deposit engaged in the transaction of such business under the name of the California National Bank of San Diego, California, in the said City of San Diego, California.

II.—That on or about the 18th day of December, 1891, the said California National Bank of San Diego, California, being insolvent and being unable to meet its just debts and liabilities, the plaintiff above named was duly appointed Receiver of the said bank by the Comptroller of the Currency of the United

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States, thereunto duly authorized by law in such 13
cases made and provided, and this plaintiff has since the date of such appointment entered upon the discharge of his duties as such Receiver, and is duly authorized and empowered to bring this action.

III.—That at all the times hereinafter mentioned the defendant was and still is a domestic corporation duly organized and existing under the laws of the State of New York and carrying on and transacting business in the City of New York, in the State of New York, being engaged in the business, among other things, of issuing surety or guarantee bonds for persons in positions of public or private trust throughout the United States and in Canada, and is 14
a citizen, resident and inhabitant of the Southern District of New York.

IV.—That on or about the first day of July, 1891, one John W. Collins having been appointed in the service of the California National Bank of San Diego, California, and having been assigned to the office or position of president of said bank, and being about to enter upon the duties of such office or position, the defendant above named duly executed and delivered to the said California National Bank of San Diego, California, a guarantee bond, a copy of which is hereto annexed and marked "A" for identification, and made a part of this complaint. 15

V.—That the said John W. Collins entered upon the discharge of his duties as president of said bank as aforesaid mentioned, and continued to act as such president between the 1st day of July, 1891, and about the 18th day of December, 1891.

VI.—That between the 1st day of July, 1891, and about the 18th day of December, 1891, the said John W. Collins, while employed as president of said bank as heretofore mentioned, and during the continuance of said bond, wrongfully, dishonestly

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and fraudulently misappropriated and converted to his own use moneys, securities and other personal property belonging to said bank and in the possession of the said John W. Collins as president, and for the possession of which he was responsible, amounting in value to an amount far exceeding the sum of twenty-five thousand dollars, and the said bank during the continuance of the said bond sustained pecuniary loss of money, securities and other personal property in the possession of the said Collins, and for the possession of which he was responsible during the continuance of said bond, by acts of fraud and dishonesty on the part of the said Collins in connection with the duties of the office or position referred to in said bond during the period between the times last above mentioned in the amount of over twenty-five thousand dollars.

VII.—That between the dates last above mentioned the said John W. Collins, while employed as president of said bank as heretofore mentioned, and during the continuance of said bond, embezzled, abstracted and willfully misapplied moneys, funds or credits of said bank, and, without any authority from the directors of said bank, issued and put forth certain certificates of deposit, and, without the authority of the directors of such bank, issued and put in circulation notes of said bank and made false entries in the books of said bank with the intent to injure and defraud said bank, and to deceive an officer or officers of said bank, and any agent appointed to examine the affairs of said bank, by reason of which the said bank suffered pecuniary loss in a sum far exceeding twenty-five thousand dollars.

VIII.—That between the dates last above mentioned the said John W. Collins, while employed as president of said bank as heretofore mentioned, and during the continuance of said bond, aided and abetted the cashier of said bank, one George N. O'Brien, in embezzling, abstracting and willfully

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misapplying moneys, funds and credits of said bank, 19
and, without any authority from the directors of said bank aided and abetted the said O'Brien as such cashier in issuing and putting forth certain certificates of deposit, and, without authority from the directors of said bank, aided and abetted the said O'Brien in issuing and putting into circulation notes of said bank, and in making false entries in the books of said bank with intent to injure and defraud said bank and to deceive an officer or officers of said bank and any agent appointed to examine the affairs of said bank, by reason of which the said bank suffered pecuniary loss in a sum far exceeding twenty-five thousand dollars.

20

IX.—That on or about June 18, 1892, and as soon as practicable after the occurrence of the aforesaid wrongful acts of the said Collins, this plaintiff duly mailed at San Diego, California, in an envelope addressed to the said defendant at its office in the City of New York, a notice, in writing, of the acts of fraud and dishonesty of said Collins, and a written statement of the loss sustained by said bank by reason of the acts of fraud and dishonesty of said Collins, certified by the plaintiff and based upon the accounts of said Collins, and presented satisfactory proofs of the loss sustained by said bank by reason of the acts of said Collins, during the continuance of said bond, and duly demanded from this defend- 21
ant that this defendant make good and reimburse to this plaintiff the sum of twenty-five thousand dollars, the amount of pecuniary loss sustained by said bank by reason of the acts of fraud and dishonesty of said Collins, being the amount conditioned to be paid by the terms of the said guarantee bond heretofore mentioned.

X.—That the said defendant received each and all of the papers mentioned in paragraph nine of this complaint within at least ten days after the date of

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22 mailing thereof, as alleged in paragraph nine of this complaint.

XI.—That the said defendant has retained in its possession each and all of the papers mentioned in paragraph nine of this complaint since the receipt thereof by said defendant, and has never up to the time of the commencement of this action objected thereto, either to this plaintiff or to said bank, as not being sufficient as a notice or statement of loss or proofs of loss, as provided by the said bond heretofore mentioned, nor has said defendant raised any objection of any kind or nature whatsoever thereto, either to this plaintiff or to the said bank.

23 XII.—That this plaintiff and the California National Bank of San Diego, California, have duly performed all the conditions and provisions of said guarantee bond on his and its part required to be performed.

XIII.—That the said defendant has neglected and refused to pay to this plaintiff the said sum of twenty-five thousand dollars or any sum whatever, although requested so to do, and although justly indebted to this plaintiff in the sum of twenty-five thousand dollars.

Wherefore, the plaintiff demands judgment against the defendant in the sum of twenty-five
24 thousand dollars, with interest thereon from June 18, 1892, besides costs and disbursements of this action.

MITCHELL & MITCHELL,
Attorneys for Plaintiff,
45 and 47 Wall St.,
New York City.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

WILLIAM MITCHELL, being duly sworn, says: That he is a member of the firm of Mitchell & Mitchell, attorneys for the plaintiff in the above entitled ac-

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tion, and attorney and of counsel for the plaintiff herein; that he has read the foregoing complaint, and knows the contents thereof, and the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. The reason why this verification is not made by the plaintiff is that the said plaintiff is not a resident of this State, and is not now within the City and County of New York, where this deponent has his office for the transaction of business.

That the grounds of belief as to all matters not stated upon his knowledge are letters received from the plaintiff in this action and extracts from the books of the California National Bank of San Diego, California, and also the original bond executed and delivered by the defendant in this action to the said bank, which is in the possession of deponent, and copies or extracts from the proofs of loss made out by the plaintiff herein.

WILLIAM MITCHELL.

Sworn to before me this 8th day of March, 1893.

GUSTAVUS W. RAWSON,
[L. S.] Notary Public (5),
N. Y. City and Co.

"A."

BOND NO. 85495.

AMERICAN SURETY COMPANY

OF NEW YORK.

Capital $1,000,000, fully paid.

General Offices No 160 Broadway, New York.

Amount $25,000. Premium $125.00.

THIS BOND, made the First day of July, one thousand eight hundred and ninety-one, between the

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AMERICAN SURETY COMPANY OF NEW YORK, hereinafter called the "Company," of the first part, and JOHN W. COLLINS, of San Diego, County of San Diego, State of California, hereinafter called the "Employee," of the second part, and CALIFORNIA NATIONAL BANK, San Diego, California, hereinafter called the "Employer," of the third part.

Whereas, the Employee has been appointed in the service of the Employer, and has been assigned to the office or position of President by the Employer, and has applied to the American Surety Company of New York for the grant by it of this Bond:

Now therefore, in consideration of the sum of one hundred and twenty-five dollars, lawful money of the United States of America, in hand paid to the Company, as a premium for the term of twelve months ending on the First day of July, one thousand eight hundred and ninety-two, at 12 o'clock noon, it is hereby declared and agreed, that subject to the provision herein contained, the Company shall, within three months next after notice, accompanied by satisfactory proof, of a loss, as hereinafter mentioned, has been given to the Company, make good and reimburse to the Employer all and any pecuniary loss sustained by the Employer, of moneys, securities, or other personal property in the possession of the Employee, or for the possession of which he is responsible, by any act of fraud, or dishonesty, on the part of the Employee, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the Employer's service he may be subsequently appointed, and occurring during the continuance of this Bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal, or retirement of the Employee, from the service of the Employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the Employer, and based upon the accounts of the

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Employer, shall be *prima facie* evidence thereof. 31
Provided always, that the Company, shall not be liable, by virtue of this Bond, for any mere error of judgment, or injudicious exercise of discretion on the part of the Employee, in and about all or any matters, wherein he shall have been vested with discretion, either by instruction, or rules and regulations of the Employer. And it is expressly understood and agreed that the Company shall in no way be held liable hereunder to make good any loss which may accrue to the Employer by reason of any act or thing done, or left undone, by the Employee, in obedience to, or in pursuance of any direction, instruction or authorization conveyed to and received by him from the Employer or its duly au- 32
thorized officer in that behalf; and it is expressly understood and agreed that the Company shall in no way be held liable hereunder to make good any loss by robbery or otherwise, that the Employer may sustain, except by the direct act or connivance of the Employee.

The following provisions also are to be observed and binding as a part of this Bond:

That the Company shall be notified in writing, at its office in the City of New York, of any act on the part of the Employee, which may involve a loss for which the Company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the Employer. 33
That any claim made in respect of this Bond shall be in writing, addressed to the Company, as aforesaid, as soon as practicable after the discovery of any loss for which the Company is responsible hereunder, and within six months after the expiration or cancellation of this Bond as aforesaid. And upon the making of such claim, this Bond shall wholly cease and determine as regards any liability for any act or omission of the Employee committed subsequent to the making of such claim, and shall be surrendered to the Company on payment of such claim.

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That the Company shall not in any wise be responsible to the Employer under this Bond, to a greater extent than twenty-five thousand dollars.

That if the Employer shall at any time hold concurrently with this Bond any other Bond or guarantee of security from or on behalf of the Employee, the Employer shall be entitled in the event of loss by default of the Employee, to claim hereunder only such proportion of the loss as the amount covered by this Bond bears to such other security.

That if the Company shall so elect, this Bond may be cancelled at any time by giving one month's notice to the Employer, and refunding the premium paid, less a *pro rata* part thereof for the time said Bond shall have been in force, remaining liable for all or any default covered by this Bond, which may have been committed by the Employee, up to the date of such determination, and discovered and notified to the Company within the limit of time hereinbefore provided for.

That the Employer shall, if required by the Company, and as soon thereafter as it can reasonably be done, give all such aid and information as may be possible (at the cost and expense of the Company), for the purpose of prosecuting and bringing the Employee to justice, or for aiding the Company in suing for and making effort to obtain reimbursement by the Employee or his estate, of any moneys which the Company shall have paid or become liable to pay by virtue of this Bond.

That no suit or proceeding at law or in equity shall be brought to recover any sum hereby insured, unless the same is commenced within one year from the time of the making of any claim on the Company.

That no one of the above conditions, or of the provisions contained in this Bond, shall be deemed to have been waived by or on behalf of the said Company, unless the waiver be clearly expressed in

writing over the signatures of its President and its Secretary, and its seal thereto affixed. 37

That the Company upon the execution of this Bond, shall not thereafter be responsible to the Employer under the obligations of any previous Bond issued upon the Employee; and upon the execution by the Company of any new Bond to the Employer upon said Employee, all the obligations of this Bond shall immediately cease and determine, it being mutually understood that it is the intention of this provision that but one (the last Bond) shall be in force at one time, unless otherwise stipulated between the Employer and the Company.

And the Employee doth hereby for himself, his heirs, executors and administrators, covenant and agree to and with the Company, that he will save, defend and keep harmless the Company from and against all loss and damage of whatever nature or kind, and from all legal and other costs and expenses, direct or incidental, which the Company shall or may at any time sustain or be put to (whether before or after any legal proceedings by or against it, to recover under this Bond, and without notice to him thereof), or for, or by reason, or in consequence of the Company having entered into the present Bond. 38

It is further agreed that this Bond may at the option of the Employer be continued in force from year to year at the same premium rate as long as the Company shall consent to receive the same, in which case the Company shall remain liable for any dishonest act of the Employee occurring between the original date of this Bond and the time to which it shall have been continued. 39

In witness whereof, the said John M. Collins (the Employee) hath hereunto set his hand and seal, and the Company has caused this Bond to be signed by its 2nd Vice President and its Assistant Secretary, and its seal to be hereunto affixed this First day of

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July, one thousand eight hundred and ninety-one.

JOHN W. COLLINS, [L. S.]
Employee.
DAVID B. SICKELS,
2nd Vice-President.

Signed, Sealed and Delivered by Employee, at San Diego Aug. 18th in the presence of
H. P. GREGOR.

American Surety Co. (S)

Attest:
WM. A. BRANOF,
Assistant Secretary.
Examined,
W. E. S.

(Endorsed)—U. S. Circuit Court For the Southern District of New York.—Frederick N. Pauly, as Receiver, &c., Plaintiff, against American Surety Company of New York, Defendant.—Action No. II.—Summons and Complaint.—Mitchell & Mitchell, Attorneys for Plaintiff, 45 & 47 Wall Street, New York City.—I hereby certify That on the 8th day of May, 1893, at the City of New York, in my District, I personally served the within Summons upon the within named Defendant, American Surety Company of New York, by exhibiting to Harry D. Lyman, Second Vice-President of said Co. the within original, and at the same time leaving with him a copy thereof. And at the same time and place I delivered to and left with him a copy of the annexed complaint.—John W. Jacobus, United States Marshal.—Southern District of New York.—Dated Jul. 28, 1893.

UNITED STATES CIRCUIT COURT, 43

SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California,
Plaintiff,
AGAINST
THE AMERICAN SURETY COMPANY OF NEW YORK,
Defendant. 44

Action No. 2.

Please to take notice that the defendant, the American Surety Company of New York, appears in this action, and that I am retained by and appear for the said defendant in this action, and demand that a copy of all papers in this action be served on me at my office, No. 160 Broadway, New York City, N. Y.

Dated May 23, 1893.

Yours, &c.,
HENRY C. WILLCOX, 45
Attorney for Defendant.
Office and Post Office address,
No. 160 Broadway,
New York City, N. Y.
To MITCHELL & MITCHELL, Esqs.,
Plaintiff's Attorneys.

(Endorsed)—Action No. 2.—United States Circuit Court, Southern District of New York.—Frederick N. Pauly, as Receiver of the California National Bank of San Diego, California, vs. The American Surety Company of New York.—

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46 Notice of Appearance and Demand.—Henry C. Willcox, Defendant's Attorney, 160 Broadway, New York City.—To the Clerk of the United States Circuit Court, for the Southern District of New York.—Please note the appearance of the American Surety Company of New York.—U. S. Circuit Court.—Filed May 24, 1893.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

47

FREDERICK N. PAULY as Receiver of the California National Bank of San Diego, California. Plaintiff, AGAINST AMERICAN SURETY COMPANY OF NEW YORK, Defendant.	Action No. 2. (Collins, President.) Amended Answer.

48 The American Surety Company of New York, answering the complaint of the plaintiff herein:

I. Upon information and belief, it denies each and every allegation in said complaint contained, not hereinafter specifically admitted.

2. It admits the allegations in the paragraphs or subdivisions of said complaint numbered "I," "III," and "IV".

And for a further, separate and distinct defence, defendant alleges:

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3. That in and by said bond or obligation set forth 49
in said complaint it is, among other things, provided that this defendant, subject to the provisions therein contained, shall within three months next after notice, accompanied by satisfactory proof of loss, as therein mentioned, make good and reimburse said California National Bank, employer, any pecuniary loss by it sustained of moneys, securities or other personal property in the possession of said John W. Collins, employee, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of said employee in connection with the duties of the office or position of president of said bank, therein referred to, occurring during the term of twelve months, ending on 50
the 1st day of July, 1892, at 12 o'clock noon, and discovered during the said term or within six months thereafter, and within six months from the death or dismissal or retirement of said employee from the service of said employer. That the said John W. Collins was dismissed from the service of his said employer prior to the 13th day of November, 1892; that the losses in said complaint alleged to have been by said bank suffered were not of moneys, securities or other personal property in the possession of said employee, or for the possession of which he was responsible, by any act of fraud or dishonesty on the part of said employee, in connection with the duties of his office, nor did such losses occur 51
during the term in said bond provided, nor were such losses or either of them discovered during such term, or within six months thereafter, and within six months from the death or dismissal or retirement of said employee from the service of his said employer.

For a further, separate and distinct defense, defendant alleges:

4. That in and by said bond or obligation it is, among other things, provided that this defendant was not to be liable by virtue of said bond or obli-

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52 gation for any mere error of judgment or injudicious exercise of discretion on the part of said employee, in and about all or any matters wherein he shall have been vested with discretion, either by instructions or the rules and regulations of the said employer; that said John W. Collins faithfully and in all respects honestly performed the duties of his office, and that if the said employer suffered any loss by reason of any act of the said John W. Collins, then such loss arose by reason of a mere error of judgment or injudicious exercise of discretion on the part of said John W. Collins, in and about matters wherein he was vested with discretion, either by instructions or the rules and regulations of his
53 said employer.

And, further answering, for a further, separate and distinct defense, the defendant alleges:

5. That in and by said bond or obligation it is, among other things, provided that this defendant shall in no way be held liable therein to make good any loss which may accrue to said employer by reason of any act or thing done or left undone by said employee in obedience to or in pursuance of any direction or instruction or authorization conveyed to or received by said employee from his said employer, or its duly authorized officers in their behalf, as by reference to said bond or obligation will
54 more full appear; that if the said California National Bank suffered any loss by reason of any act of the said John W. Collins, employee, then such loss arose or accrued by reason of acts or things done or left undone by him, said employee, in obedience to or in pursuance of directions, instructions or authorizations conveyed to and received by him from his said employer or its duly authorized officers in their behalf.

For a further, separate and distinct defense, defendant alleges:

9. That in and by said bond or obligation it is, among other things, provided that this defendant shall be notified, in writing, at its office in the City of New York, of any act on the part of the employee which may involve a loss for which the company is responsible thereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer, and this defendant alleges, upon information and belief, that the plaintiff did not notify this defendant in writing at its office in the City of New York of the acts therein alleged to have caused the losses in said complaint alleged to have been by said bank suffered as soon as practicable after the occurrence thereof came to the knowledge of the plaintiff. 55 56

And for a further, separate and distinct defense this defendant alleges:

7. That in and by said bond or obligation it is, among other things, provided that any claim made in respect thereto should be in writing addressed to the company at its office in the City of New York as soon as practicable after the discovery of any loss for which the company is responsible thereunder, and within six months after the expiration or cancellation of the said bond, and this defendant alleges that this plaintiff did not give notice in writing to the defendant at its office in the City of New York of any claim in respect to the said bond as soon as practicable after the discovery of the losses alleged to have been by said bank suffered, or within six months after the expiration or cancellation of the said bond. 57

For a further, separate and distinct defense defendant alleges, upon its information and belief:

8. That from the organization of the California National Bank of San Diego, at some time in the year 1888, down to the time when the said bank procured from this defendant the bond mentioned in and attached to the complaint herein, the said

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58 John W. Collins had frequently engaged in transactions and performed acts, in the course of his employment by and in connection with the bank, which were in all respects identical in character with those which are now by the complaint herein charged to be fraudulent and dishonest. That said transactions and acts were not done secretly, nor did the said Collins make any attempt to conceal them. That the same were entered in the books of the bank as they occurred, and if they were not actually known to the officers of the bank and to its directors it was because said officers and directors were wholly unmindful and neglectful of their duties as such officers and directors, and wholly failed to take
59 any steps or make any effort to discharge the same. That, had they taken the slightest care in the premises, the acts of said Collins would have become known to them, and it would thereupon have become impossible for the bank to have sustained, through the alleged subsequent acts of the said Collins, the loss alleged in the complaint or any loss whatever.

9. And for a further and separate defense, this defendant avers, upon information and belief, that from the organization of the California National Bank of San Diego, at some time in the year 1888, down to the time when the said bank procured from
60 this defendant the bond mentioned in and attached to the complaint herein the said John W. Collins had frequently engaged in transactions and performed acts, in the course of his employment by and in connection with the bank, which were in all respects identical in character with those which are now by the complaint charged to be fraudulent and dishonest. That such transactions and acts were well known to the said California National Bank of San Diego, its directors and officers, including the officers who acted for said bank in procuring said bond from this defendant, and that at the time of procuring the bond aforesaid, this defendant was not informed of

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them, but the same were concealed from it, and it 61
issued said bond in entire ignorance thereof. And this defendant, therefore, avers that it was induced to execute and deliver said bond by a fraudulent suppression and concealment of material facts, and that the said bond is thereby rendered fraudulent and void.

And for a further, separate and distinct defense, this defendant alleges, upon its information and belief:

10. That prior to the issuance and execution of the bond in said complaint referred to, application was made to this defendant for the execution and issuance thereof; that at or about the time of said 62
application, and prior to the issuance and execution of said bond, said California National Bank of San Diego, California, represented to this defendant that said John W. Collins had been in the employ of said bank for upwards of three years, and had always performed his duties in a faithful and satisfactory manner, to the best of the knowledge of said bank: that his accounts with said bank had been last examined on the 28th day of March, 1891, and found correct in every respect. That thereupon and in reliance upon the statements and representations of the said bank in that behalf, this defendant accepted the application for such bond and thereafter executed and delivered the same to the California National 63
Bank of San Diego. That the accounts of said Collins were kept and his manner of performing his duties and his course of business as such president were similar in character subsequent to the time of the issuance by this defendant of said bond as the same were prior thereto; that if any of the acts or transactions of said Collins subsequent to the issuance of said bond were illegal or dishonest or fraudulent in any respect, then the representations of said California National Bank of San Diego in that behalf were false, and by it so known to be at the time of the making thereof, and were made with intent

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64 to deceive this defendant and obtain from it the bond in said complaint set forth.

Wherefore, defendant prays that the complaint of the plaintiff herein may be dismissed upon the merits, with costs.

HENRY C. WILLCOX,
Attorney for Defendant,
160 Broadway,
New York City,
N. Y.

STATE OF NEW YORK,
City and County of New York,
65 Southern District of New York, } ss.:

HENRY D. LYMAN, being duly sworn, says: That he is the vice-president of the American Surety Company of New York, the defendant in the above entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by him is that the defendant is a domestic corporation, of which he is an officer, to wit, vice-president.
66

HENRY D. LYMAN.

Sworn to before me this 27th day of October, 1893.

FRANKLYN PADDOCK,
[SEAL.] Notary Public (No. 63),
New York County.

Gentlemen:

Please to take notice of the defendant's amended answer to the plaintiff's complaint in the within entitled action, served in pursuance of the order granted by Mr. Justice Lacombe therein, duly filed

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in the office of the Clerk of the United States Cir- 67
cuit Court for the Southern District of New York.

Dated October 26, 1893.

Yours, &c.,

HENRY C. WILLCOX,
Defendant's Attorney,
160 Broadway,
New York City,
N. Y.

To Messrs. MITCHELL & MITCHELL,
Plaintiff's Attorneys,
45 and 47 Wall Street,
New York City, N. Y.

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(Endorsed)—Action No. 2.—United States Circuit Court for the Southern District of New York — Frederick N. Pauly, as Receiver, etc., Plaintiff, *vs.* American Surety Company of New York.—Amended Answer.—Henry C. Willcox, Defendant's Attorney, 160 Broadway, New York City, N. Y.—Service of a copy of the within amended answer is hereby admitted.—Dated New York, Oct 27, 1893.—Mitchell & Mitchell, Plff.'s Attys. —U. S. Circuit Court.—Filed Dec. 31, 1894.—John A. Shields, Clerk.

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70 UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California, Plaintiff, AGAINST 71 AMERICAN SURETY COMPANY OF NEW YORK, Defendant.	Action No. 2. (Collins, President.)

Sir,—Please take notice that the annexed is a bill of the particulars requested in your notice of June 14, 1893, of the plaintiff's claim, for which this action is brought.

Dated July 21, 1893.

Yours, &c.,
MITCHELL & MITCHELL,
Attorneys for Plaintiff,
72 45 and 47 Wall Street,
N. Y. City.

To HENRY C. WILLCOX, Esq.,
Attorney for Defendant.

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UNITED STATES CIRCUIT COURT 73

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California, Plaintiff, AGAINST AMERICAN SURETY COMPANY OF NEW YORK, Defendant.	Action No. 2. (Collins, President.)

74

BILL OF PARTICULARS.

1. The following are the dates when and the manner in which John W. Collins wrongfully and fraudulently misappropriated and aided in the wrongful and fraudulent misappropriation of moneys, securities and other personal property belonging to said bank, with the amounts of such moneys, and a description of such securities and other personal property as alleged in paragraph "6" of plaintiff's complaint: 75

That on or about the 22d day of September, 1891, J. W. Collins, then president of the California National Bank of San Diego, California, caused and procured to be issued to him a certificate of deposit numbered 6800, certifying that said J. W. Collins had on deposit in said California National Bank of San Diego the sum of $7,500, and on the same day caused and procured to be issued to him a certain other certificate of deposit numbered 6801, certifying that J. W. Collins had on leposit in said California National Bank the sum of

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76 $8,500; both of said certificates were made payable to the order of J. W. Collins. The fact was, however, that the said J. W. Collins had not any sum of money on deposit in said bank, and the said bank was not indebted to him in any sum, but, on the contrary, he, the said J. W. Collins, was at that time largely indebted to the bank.

That the said J. W. Collins thereafter loaned and negotiated the said certificates of deposit with other banks and other parties, and obtained thereon the sum of $16,000, which sum he, the said J. W. Collins, on or about the 22d day of September, 1891, appropriated to his own use.

That on or about the 13th day of October, 1891,
77 the said J. W. Collins obtained from the United States National Bank of New York a loan of $25,000 upon a note of the California National Bank, executed by said J. W. Collins, as president of said bank, but executed and delivered by him without any authority whatever from the board of directors of the California National Bank, and by re-discounting certain other individual notes which are herein specifically described in paragraph II., which were the assets of said bank.

And that he had the said amount credited to his own personal account, and thereafter drew out said sum of $25,000 from the funds of the California National Bank and applied said sum to his own in-
78 dividual use.

On the same day, to wit, October 13, 1891, the said J. W. Collins, while president of the California National Bank, obtained from the Western National Bank of New York a loan of $20,000 upon a note of the said California National Bank executed and delivered by the said J. W. Collins as president, but without any authority from the Board of Directors therefor, for the sum of $20,000, and made payable to himself, and for the purpose of said loan placed it with other notes as collateral herein, more specifically described in paragraph II., held as assets of said bank for said loan. That as such president

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he had the said amount of $20,000 credited to his 79
account without any consideration therefor, and appropriated the said sum of $20,000 to his own individual use.

That on or about the 31st day of October, 1891, the said J. W. Collins abstracted and misappropriated of the funds of said California National Bank of San Diego, the sum of $10,000; he, the said J. W. Collins, then and there being the president of said bank, by then and there causing and procuring the account of said Collins with said bank to be credited with the said sum of $10,000 without depositing any sum in said bank, or paying said bank any consideration therefor, and without then and there being entitled to said credit; the said J. W. Collins 80
thereafter, and before the suspension of said bank, checked out, used and appropriated to his own use said sum of $10,000.

On the same day, to wit, on the 31st day of October, 1891, said J. W. Collins, as president of said bank, caused and procured his said account with said bank to be credited with the further sum of $10,000 without depositing any sum in said bank or paying said bank any consideration therefor, and without then and there being entitled to said credit; the said J. W. Collins, afterward, and before the suspension of said bank, to wit, November 12, 1891, checked out, used and appropriated to his own use said sum of $10,000.

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2. The following is the amount of the pecuniary loss by said bank sustained of moneys, securities and other personal property in the possession of said Collins or for the possession of which he was responsible, with a description of such securities or other personal property as alleged in paragraph "6" of said complaint.

The pecuniary loss sustained by said bank on account thereof is the sum of $81,000. The securities and personal property alleged in paragraph six of said complaint were: Two certificates of deposit

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issued to said J. W. Collins on or about the 22d day of September, 1891, made payable to said J. W. Collins, numbered 6800 and 6801, respectively, one for the sum of $7,500 and the other for the sum of $8,500, signed by George N. O'Brien, as cashier of the California National Bank.

A promissory note dated October 31, 1891, executed by the California National Bank, per J. W. Collins, president, for $17,500, made payable to the United States National Bank of New York or order; a promissory note made and executed by George W. Marston to the California National Bank for the sum of $1,500; a promissory note made and executed by William Collier, dated July 28, 1891, made payable to the California National Bank, for the sum of $4,499.65, to become due November 28, 1891; a promissory note, made and executed by the Silver Gate Manufacturing Co., dated August 17, 1891, made payable to the California National Bank, for the sum of $8,488.40, made due and payable December 17, 1891; a promissory note made and executed by George W. Marston for the sum of $2,500, dated September 19, 1891, payable to the California National Bank, and due and payable December 18, 1891; a promissory note, made and executed by the Bear Valley Irrigation Company, date unknown, made payable to the Silver Gate Manufacturing Company for the sum of $5,672.45, and due and payable January 1, 1892; a promissory note made and executed by the California National Bank, per J. W. Collins, president, dated October 12, 1891, made payable to the order of J. W. Collins, for the sum of $20,000, due January 10, 1892; a promissory note, executed by W. O. Havermale, dated August 3, 1891, made payable to the California National Bank and due November 1, 1891, for the sum of $10,000; a promissory note, made and executed by William Collier and Margaret C. Graham, for the sum of $2,250, made payable to the order of the California National Bank, dated July 28, 1891, due November 28, 1891; a promissory note, made and

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executed by George W. Marston, for the sum of $1,000, payable to the order of the California National Bank, and dated September 14, 1891, due and payable December 13, 1891. 85

3. The following are the acts of fraud and dishonesty on the part of said Collins in connection with the duties of his office or position, with the dates thereof, alleged in paragraph "6" of said complaint:

That on or about the 22d day of September, 1891, J. W. Collins, then president of the California National Bank of San Diego, California, caused and procured to be issued to him a certificate of deposit numbered 6800, certifying that said J. W. Collins had on deposit in said California National Bank of San Diego the sum of $7,500; and on the same day caused and procured to be issued to him a certain other certificate of deposit, numbered 6801, certifying that J. W. Collins had on deposit in said California National Bank the sum of $8,500; both of said certificates of deposit were made payable to the order of J. W. Collins. The fact was, however, that the said J. W. Collins had not any sum of money on deposit in said bank, and the said bank was not indebted to him in any sum; but, on the contrary, he, the said J. W. Collins, was at that time largely indebted to said bank. That the said J. W. Collins thereafter loaned and negotiated the said certificates of deposit with other banks and other parties, and obtained thereon the sum of $16,000, which sum he, the said J. W. Collins, on or about the 22d day of September, 1891, appropriated to his own use. 86 87

That on or about the 13th day of October, 1891, the said J. W. Collins obtained from the United States National Bank of New York a loan of $25,000 upon a note of the California National Bank, executed by said J. W. Collins, as president of said bank, but executed and delivered by him without any authority from the Board of Directors of the Cali-

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88 fornia National Bank, and by rediscounting certain other individual notes which are herein specifically described in paragraph 2, which were the assets of said bank. And that he had the said amount credited to his own personal account, and thereafter drew out said sum of $25,000 from the funds of the California National Bank and applied said sum to his own individual use.

On the said day, to wit, October 13, 1891, the said J. W. Collins, while president of the California National Bank, obtained from the Western National Bank of New York a loan of $20,000 upon a note of the said California National Bank, executed and delivered by the said J. W. Collins, as president, but
89 without any authority from the board of directors therefor, for the sum of $20,000, and made payable to himself, and for the purpose of said loan placed it as collateral with other notes herein more specifically described in paragraph 2, held as assets of said bank, for said loan. That as such president he had the said amount of $20,000 credited to his own account without any consideration therefor, and appropriated the said sum of $20,000 to his own individual use.

That on or about the 31st day of October, 1891, the said J. W. Collins abstracted and misappropriated of the funds of said California National Bank of San Diego, the sum of $10,000, he, the said J. W. Col-
90 lins, then and there being the president of said bank, by then and there causing and procuring the account of said Collins with said bank to be credited with the said sum of $10,000, without depositing any sum in said bank or paying said bank any consideration therefor, and without then and there being entitled to said credit, the said J. W. Collins thereafter, and before the suspension of said bank, checked out, used and appropriated to his own use the said sum of $10,000.

On the same day, to wit, on the 31st day of October, 1891, the said J. W. Collins, as president of said bank, caused and procured his said account

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with said bank to be credited with the further sum of $10,000, without depositing any sum in said bank, or paying said bank any consideration therefor, and without then and there being entitled to said credit. The said J. W. Collins afterwards and before the suspension of said bank, to wit, November 12, 1891, checked out, used and appropriated to his own use said sum of $10,000. 91

4. The following are the dates when, and the manner in which the said J. W. Collins, while employed as president of said bank, embezzled, abstracted and wilfully misapplied moneys, funds or credits of said bank, and without authority of the directors of said bank, issued and put forth certain certificates of deposit and put in circulation notes of said bank, and made false entries in the books of said bank, with intent to injure and defraud said bank, with the amounts of moneys or funds thus embezzled, abstracted or wilfully misapplied, and a statement of such credits and the amounts thereof, and the dates and amounts and a description of notes and of such certificates of deposit, and the false entries thus made in the books of said bank, and the amount of the loss by said bank suffered as alleged in paragraph "7" of said complaint: 92

That on or about the 22d day of September, 1891, J. W. Collins, then president of the California National Bank, of San Diego, California, caused and procured to be issued to him a certificate of deposit numbered 6,800, certifying that said J. W. Collins had on deposit in said California National Bank of San Diego, the sum of $7,500; and on the same day caused and procured to be issued to him a certain other certificate of deposit numbered 6,801, certifying that J. W. Collins had on deposit in said California National Bank, the sum of $8,500; both of said certificates of deposit were made payable to the order of J. W. Collins.. The fact was, however, that the said J. W. Col- 93

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94 lins had not any sum of money on deposit in said bank, and the said bank was not indebted to him in any sum; but on the contrary, he, the said J. W. Collins, was at that time largely indebted to said bank. That the said J. W. Collins thereafter loaned and negotiated the said certificates of deposit with other banks and other parties, and obtained thereon the sum of $16,000, which sum he, the said J. W. Collins, on or about the 22d day of September, 1891, appropriated to his own use.

That on or about the 13th day of October, 1891, the said J. W. Collins obtained from the United States National Bank of New York a loan of $25,000 upon a note of the California National Bank, exe-
95 cuted by said J. W. Collins, as President of said bank, but executed and delivered by him without any authority whatever from the Board of Directors of the California National Bank, and by re-discounting certain other individual notes which are herein specifically described in paragraph 2, which were the assets of said bank. And that he had the said amount credited to his own personal account, and thereafter drew out the sum of $25,000 from the funds of the California National Bank, and applied said sum to his own individual use.

On the same day, to wit, October 13, 1891, the said J. W. Collins, while President of the California National Bank, obtained from the Western National
96 Bank, of New York, a loan of $20,000 upon a note of the said California National Bank, executed and delivered by the said J. W. Collins, as president, but without any authority from the Board of Directors therefor for the sum of $20,000, and made payable to himself, and for the purpose of said loan placed it as collateral with other notes herein, more specifically described in paragraph 2, held as assets of said bank for said loan. That as such president he had the said amount of $20,000 credited to his own account without any consideration therefor, and appropriated the said sum of $20,000 to his own individual use.

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That on or about the 31st day of October, 1891, 97
the said J. W. Collins abstracted and misappropriated of the funds of said California National Bank of San Diego the sum of $10,000, he, the said J. W. Collins, then and there being the president of said bank, by then and there causing and procuring the account of said Collins with said bank to be credited with the said sum of $10,000 without depositing any sum in said bank or paying said bank any consideration therefor and without then and there being entitled to said credit; the said J. W. Collins thereafter and before the suspension of said bank checked out, used and appropriated to his own use said sum of $10,000.

On the same day, to wit, on the 31st day of Octo- 98
ber, 1891, said J. W. Collins, as president of said bank, caused and procured his said account with said bank to be credited with the further sum of $10,000, without depositing any sum in said bank or paying said bank any consideration therefor and without then and there being entitled to said credit. The said J. W. Collins afterward and before the suspension of said bank, to wit, November 12, 1891, checked out, used and appropriated to his own use said sum of $10,000.

5. The following are the dates when and the manner in which the said Collins aided and abetted the cashier of said bank, one George N. O'Brien, in 99
embezzling, abstracting and wilfully misapplying the funds and credits of said bank, giving the amounts of moneys and funds and a statement of the credits thus embezzled, abstracted and wilfully misapplied, the dates when and the manner in which the said John W. Collins aided and abetted the said O'Brien in putting forth certain certificates of deposit with a statement of the dates and amounts of such certificates of deposit and a description thereof, to whom issued, the dates when and the manner in which the said Collins aided and abetted said O'Brien in issuing and putting into circulation

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notes of said bank, with the amounts and dates of such notes and a description thereof, and to whom issued, and dates when and the manner in which the said Collins aided and abetted said O'Brien in making false entries in the books of said bank with intent to injure and defraud said bank, with the dates of such entries and the substance thereof, and the amounts in which said bank suffered pecuniary loss as alleged in the "8" paragraph of plaintiff's complaint:

That on or about the 22d day of September, 1891, J. W. Collins, then President of the California National Bank of San Diego, California, caused and procured to be issued to him a certificate of deposit numbered 6,800, certifying that said J. W. Collins had on deposit in said California National Bank of San Diego, the sum of $7,500, and on the same day caused and procured to be issued to him a certain other certificate of deposit numbered 6,801, certifying that J. W. Collins had on deposit in said California National Bank the sum of $8,500; both of said certificates of deposit were made payable to the order of J. W. Collins. The fact was, however, that the said J. W. Collins had not any sum of money on deposit in said bank, and the said bank was not indebted to him in any sum, but on the contrary, he, the said J. W. Collins, was at that time largely indebted to said bank. That the said J. W. Collins thereafter loaned and negotiated the said certificates of deposit with other banks and other parties, and obtained thereon the sum of $16,000, which sum he, the said J. W. Collins, on or about the 22d day of September, 1891, appropriated to his own use. That on or about the 13th day of October, 1891, the said J. W. Collins obtained from the United States National Bank of New York a loan of $25,000 upon a note of the California National Bank, executed by said J. W. Collins as president of said bank, but executed and delivered by him without any authority whatever from the Board of Directors of the California National Bank,

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and by re-discounting certain other individual notes which are herein specifically described in paragraph 2, which were the assets of said bank, and that he had said amount credited to his own personal account, and thereafter drew out said sum of $25,000 from the funds of the California National Bank, and applied said sum to his own individual use. 103

On the same day, to wit, October 13, 1891, the said J. W. Collins, while President of the California National Bank, obtained from the Western National Bank of New York a loan of $20,000 upon a note of the said California National Bank executed and delivered by the said J. W. Collins as president but without any authority from the board of directors therefor for the sum of $20,000 and made payable to himself, and for the purpose of said loan placed it as collateral with other notes herein more specifically described in paragraph 2, held as assets of said bank for said loan. That as such president, he had the said amount of $20,000 credited to his own account without any consideration therefor and appropriated the said sum of $20,000 to his own individual use. 104

That on or about the 31st day of October, 1891, the said J. W. Collins abstracted and misappropriated of the funds of said California National Bank of San Diego the sum of $10,000, he, the said J. W. Collins, then and there being the president of said bank, by then and there causing and procuring the account of said Collins with said bank to be credited with the said sum of $10,000 without depositing any sum in said bank or paying said bank any consideration therefor and without then and there being entitled to said credit; the said J. W. Collins thereafter and before the suspension of said bank checked out, used and appropriated to his own use said sum of $10,000. 105

On the same day, to wit, the 31st day of October, 1891, said J. W. Collins, as president of said bank, caused and procured his said account with said bank to be credited with the further sum of $10,000 with-

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106 out depositing any sum in said bank or paying said bank any consideration therefor and without then and there being entitled to said credit; the said J. W. Collins afterward and before the suspension of said bank, to wit, November 12, 1891, checked out, used and appropriated to his own use said sum of $10,000.

That on or about the 13th and 14th days of October, 1891, at the request of J. W. Collins, George N. O'Brien, acting as cashier of said bank, having charge and supervision of the books of said bank, made entries on the deposit tags of said bank and caused the same to be entered by a bookkeeper on the books of said bank of credit in favor of J. W.
107 Collins for the sum of $45,000, without the said credit being due the said Collins, and without the said Collins paying any consideration therefor to said bank and without his being entitled to such credit in any manner whatever, as the said George N. O'Brien and J. W. Collins well knew, and that said J. W. Collins at that time had largely overdrawn his accounts as said O'Brien, and said Collins knew and was allowed soon thereafter to draw from the funds of said bank more than the amount of $45,000 and appropriated the money to said Collins' own use.

That the amount of the loss suffered by said bank as alleged in paragraph 8 of said complaint is the
108 sum of $81,000.

VI.—That the date of the dismissal, death or retirement was the second of March, 1892; that the acts of fraud and dishonesty referred to in paragraph nine of said complaint were discovered between 1st of May and 23d of May, 1892. The said J. W. Collins ceased to act as president of the said California National Bank upon the same going into insolvency and coming into possession of the Comptroller of the Currency of the United States, which took place November 12, 1891. That on the 29th day of December, 1891, Frederick N. Pauly, the

plaintiff herein, qualified as the Receiver of said bank, and took full possession of its assets under his trust, and that the acts of fraud and dishonesty referred to in paragraph 9 of said complaint were discovered during the months of February and March, 1892. 109

Dated July 21, 1893.

Yours, &c.,

MITCHELL & MITCHELL,
Attorneys for Plaintiff,
45 and 47 Wall Street,
N. Y. City.

UNITED STATES OF AMERICA,
State of California, } ss.: 110
District of California,

FREDERICK N. PAULY, being duly sworn, says: That he is the plaintiff in the above entitled action; that he believes the foregoing is a true and correct bill of particulars of the demand for which this action is brought.

(Sgd.) FREDERICK N. PAULY.

Sworn to before me this 21st day of July, 1893.

(Sgd.) F. P. BRUNER,
[SEAL.] Notary Public in and for San Diego Co., Calif.

111

(Endorsed)—U. S. Circuit Court, Southern Dist. of New York.—Frederick N. Pauly, as Receiver, &c., Plaintiff, against American Surety Company of New York, Defendant (2).—Notice and Bill of Particulars.—Mitchell & Mitchell, Attorneys for Plaintiff, 45 and 47 Wall Street, New York City.—Personal service of within is hereby admitted, dated San Diego, July 21, 1893.—Henry C. Willcox, Attorney for Defendant.—U. S. Circuit Court.—Filed Dec. 31, 1894. —John A. Shields, Clerk.

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112 UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California, Plaintiff, AGAINST 113 AMERICAN SURETY COMPANY OF NEW YORK, Defendant.	Action No. 2, Collins, President. Defendant's Bill of Particulars.

The statements and representations made to defendant on behalf of the California National Bank of San Diego, California, at or about the time of, and upon the application to defendant for the bond in the 10th paragraph of defendant's amended answer referred to, were by said George N. O'Brien; that application was made for a bond of indemnity, to date from July 1, 1892, for $15,000 in favor of the California National Bank of San Diego, California,
114 as security to it, covering the said O'Brien's position in its service as cashier; that San Diego was a post-office; that the full name of the said applicant was George Norton O'Brien, 24 years of age, who was born at Kewanee, Henry County, Illinois, on October 19, 1867, and resided at his native place about fifteen years; that he was unmarried, and those dependent upon him for support were his father, James O'Brien; his sister, M. Carrie O'Brien; that he had been engaged with his present employers three years and a couple of months, and about six months in the position which he then occupied; that the nature of the business of the employer was banking,

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located at San Diego, California; that the duties 115
required of the said O'Brien were bank correspondent and supervision of the several departments, and the salary he was then receiving was eighteen hundred dollars per annum, or thereabouts; that no other allowances were made to him, and the same was subject to no deduction; that he had no income worth mentioning, other than the salary above named; that he was engaged in no other business or employment; that he was not engaged and did not from time to time engage in purely speculative transactions, such as stock, grain, oil, or real estate; that he had never been bankrupt or insolvent, and that he had never compounded with his creditors; that he had never been in arrears or default in his 116
present or previous employment; that his accounts were last examined by the National Bank Examiner and found correct; that he had never been discharged from any situation, or other engagement; that he was on a few small bonds and was security on one or two notes of no consequence; that he owed about two thousand dollars on his home, and had no other debts; that he had given no other security than the bond now required, and was not then required to do so; that he did not then furnish any other security than that applied for; that he had applied to no other source for a bond; that his occupation immediately preceding his present position was real estate business, and he discontinued that to bet- 117
ter his condition; that during the past ten years the names of his employers and the dates of his employment were as follows: In the years 1884 and 1885 he was employed as bookkeeper for the O'Brien Brother Manufacturing Company, at Tiffin, Ohio, of which James O'Brien was President; that from the year 1885 to 1887 he was employed as bookkeeper and stenographer for the Baltimore and Ohio Railroad Company at Tiffin, Ohio, under E. M. Davis, D. F. A.; during the years 1887 and 1888 he was employed as bookkeeper and stenographer for W. H. Holabird & Company at San Diego, California, under W. H.

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118 Holabird. That he was a graduate of the University of Notre Dame, Indiana, having graduated in the summer of 1884, and had been in active business only seven years; that his reason for leaving former employers was his wish to go West; that his life was insured for $5,000 in the Equitable for twenty years from 1888; in the Michigan Mutual at Detroit for $2,500 for forty years from 1887; $5,000 in the United States Mutual Accident Company, one year; $1,000 in the C. K. A. Chattanooga Life; that his father was James O'Brien; his address, San Diego, California; that he had retired from business on account of old age; that his mother was not living; that his nearest male relative on his father's side
119 was Thomas O'Brien; address, Morico, Illinois, and his nearest male relative on his mother's side, Myles Seery; address, Princeville, Illinois. That the said George N. O'Brien referred to the following persons:

NAME.	OCCUPATION.	ADDRESS.
Elias Lyman	Banker	Kewanee, Illinois.
Thomas A. Noonan	Gen'l M'ger Big Four R. R. Co.	Chicago, Ill., 12 Pacific Avenue.
John Ellis	Banker	Kewanee, Illinois.
E. M. Davis	D. F. A. B. & O.	Tiffin, Ohio.
L. W. Frary	Retired	Pasadena, California.

That thereupon it was at the same time stated, represented and certified by the California National
120 Bank, acting by its president, John W. Collins, that he, the said Collins, had read the foregoing declaration and answers made by said George N. O'Brien and believed them to be true; that he, said George N. O'Brien had been in the employ of the said bank during three years, and to the best of the knowledge of the said Collins had always perform his duties in a faithful and satisfactory manner; that his accounts were last examined on the 28th day of March, 1891, and found correct in every respect; that he was not at that time, to the knowledge of the said Collins, in arrears or default; that he, the said Collins, knew nothing of his habits or antecedents affecting his

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title to general confidence, or any reason why the bond applied for should not be granted; that the amount of the bond required was $15,000, to date from July 1, 1891; that at the same time representation was made by John W. Collins, President of the California National Bank, that application was made for a bond of indemnity, to date from July 1, 1891, for $25,000 in favor of the California National Bank of San Diego, California, as security to the said bank covering the said Collins' position in its service as president at San Diego, California; that the said City of San Diego is a post office; that the full name of the applicant was John William Collins; that he was forty-two years of age; that he was born at Shrewsbury, York County, Pennsylvania, in 1848, and resided at his native place about twenty years; that he was a widower, his entire family consisting of a wife and two children, having been drowned September 1, 1890; that no one was dependent on him for support; that he had been in the employ of the said bank three and one-half years as cashier or president; that the nature of the business was banking, located at San Diego, California; that the duties required of him in his position were the handling of money, occasionally, part of the correspondence of the bank, and such as any bank might require of its president; that the salary he was receiving was $3,000, from July 1, 1891; that no other allowances were made to him and his salary was subject to no deduction; that his income from sources other than his salary aggregated, say, about $15,000 or $20,000, as stockholder in several banks; that during his employment as president of said bank, he was engaged with one Henry E. Brunell as his partner in business, keeping a dry goods store at Helena, Montana, the firm name being Brunell & Company; that he sometimes bought real estate; that he never touched anything through the Stock Exchange, such as stocks, grain, or oil, except local or bank stocks, &c.; that he had never been bankrupt or insolvent, nor compromised with his credi-

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124 tors or other scrapes of the kind; that he had never been in arrears or default in the position which he then held, or any previous position; that his accounts were last examined by the National Bank Examiner, usually once a year, and were found correct; that he had never been discharged from any situation or other engagement; that he was bondsman for several parties as notaries public, and others, such as in his banking business he found advantageous; that he sometimes owed considerable, but did not care to name amounts, and that he owned $300,000 worth of property and never gave a mortgage, when he required money he borrowed it, but usually had a good balance in the bank; that as
125 administrator he had repeatedly had bondsmen, but all were discharged at that time, except one, as nearly as he could remember; that he furnished no security other than that now applied for; that he had appiied to no other source for a bond and was not required so to do; that he formerly lived at Cheyenne, and was at that time president of the Cheyenne National Bank and the heaviest shareholder; that during the entire ten years previous to the application then made, he had been connected with the California National Bank and Cheyenne National Bank either as cashier or president, and at that time was president of both and the largest shareholder in both; he
126 referred to the cashiers of the said banks, G. L. Beard, of Cheyenne, Wyoming, or George N. O'Brien, of San Diego, California, or William Collier, of San Diego, California. That his life was insured in amounts aggregating, say $100,000, in the Equitable and New York Mutual, about $50,000 each; that his father's name was Cornelius Collins, a farmer; address, Shrewsbury, Pennsylvania; that his mother had died many years before; that his next male relative on his father's side was James W. Collins; address, Peach Bottom, York County, Pennsylvania; that his next male relative on his

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mother's side was A. G. Collins, Hebron, Nebraska; 127
that he referred to the following persons:

NAME.	OCCUPATION.	ADDRESS.
James Gerry, M. D.	Physician	Shrewsbury, Pa.
E. H. Murray	Land Owner and Editor	San Diego, Cal.
A. G. McLeod	Contractor, carpentering, &c.	Denver, Col.
E. S. N. Morgan	Attorney at Law	Cheyenne, Wyo.
M. M. Hanuna	Bank Clerk	Denver, Col.
W. R. Stebbins	Banker and land owner	C/o Chrystie & Janney, 6 Wall St., N Y. City. 128
William Collier		San Diego, Cal.

That at the same time representation was made by William Collier, one of the directors of the California National Bank of San Diego, California, that John W. Collins was not related to him; that he had known the said Collins for about three and one-half years; that he considered him sober, careful and reliable; that the said Collins lived within his means and was qualified to be intrusted with the custody of money; that he had been associated with the said Collins in business, occupying the position of president of the bank of which Collins was cashier, and 129
so had opportunities of forming a judgment of his integrity and general character, and that the said Collins had never, to his knowledge, been suspected of fraud or dishonesty, and that the said Collins had never, to his knowledge, been suspected of dishonesty or improper conduct, or been addicted to gambling; and that he had never known of said Collins speculating in stocks, or otherwise; that he desired to say that he was not in active practice as a lawyer, but was engaged in looking after his own property interests, and further, that he was a director of the said California National Bank, of which said

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130 Collins was president; that he knew of no individual debts of said Collins; but that the name of the said Collins was on the two official bonds for a limited sum; that the said Collins had never been bankrupt, insolvent or in pecuniary difficulties, that he knew of; that during the time he had been acquainted with said Collins, said Collins had been cashier and president of the California National Bank of San Diego, California; that he knew said Collins to be interested in other banks as stockholder; that said Collins gave his personal attention to the California National Bank of San Diego, California; that said Collins had not, to his knowledge, been dismissed from any situation; that his knowledge of the ap-
131 plicant's character was based on acquaintance with him for the three and one-half years, then last past, and by reports of said Collins from former acquaintances before his personal knowledge of said Collins began.

Dated December 27, 1893.

HENRY C. WILLCOX,
Attorney for Defendant,
160 Broadway,
New York City,
New York.

STATE OF NEW YORK,
City and County of New York, } ss.:
Southern District of New York,

132 HENRY D. LYMAN, being duly sworn, says: That he is Vice-president of the American Surety Company of New York, the defendant in this action; that he has read the foregoing bill of particulars, and he believes the same to be true. That the reason this verification is made by deponent is that the defendant is a domestic corporation of which he is an officer, to wit: vice-president.

HENRY D. LYMAN.

Sworn to before me this 27th day of December, 1893.

J. W. MASON,
Notary Public,
N. Y. Co.

[SEAL.]

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(Endorsed)—Action No. 2.—United States Circuit Court, for the Southern District of New York. Frederick N. Pauly, as Receiver, &c., Plaintiff, against American Surety Company of New York, Defendant.—Defendant's Bill of Particulars.—Henry C. Willcox, Defendant's Attorney, 160 Broadway, New York City.—Service of a copy of within bill of particulars is admitted.—Dated N. Y., Dec. 27, 1893.—Mitchell & Mitchell, Plff.'s Attys.—U. S. Circuit Court.—Filed Dec. 31, 1894.—John A. Shields, Clerk. 133

At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms in the City of New York, on Friday, the 19th day of October, in the year of our Lord one thousand eight hundred and ninety-four. 134

Present—The Honorable WM. J. WALLACE,
Circuit Judge.

FREDERICK N. PAULY, as Receiver,

vs.

AMERICAN SURETY CO. OF NEW YORK.

No. 2. 135

Now comes the plaintiff, by William Mitchell, Esq., his attorney, and moves the trial of this cause.

Likewise comes the defendant, by George A. Strong, Esq., its attorney.

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136 Thereupon a jury is empanelled and the cause proceeds to trial.

Afterwards and on the 25th day of October, 1894, after hearing the evidence of the respective parties, the argument of counsel and the instructions of the Court, the jury retire and on their return say that they find a verdict for the plaintiff for the full amount, with interest, making twenty-eight thousand one hundred and four dollars and sixteen cents ($28,104.16), and so say they all.

Stay of thirty days on all proceedings is granted. At the expiration of that time plaintiff may tax his costs and enter judgment and there will be a stay of proceedings upon the judgment for thirty days
137 longer and until the expiration of that stay then defendant may make and serve bill of exceptions.

(An extract from the minutes.)

[SEAL.] JOHN A. SHIELDS,
Clerk.

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BLEED THROUGH

At a Stated Term of the United States Circuit Court, for the Southern District of New York, held at the United States Court House and Post Office Building, in the City of New York, on the 25th day of October, 1894. 139

Present—Hon. WILLIAM J. WALLACE,
Circuit Judge.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California,
Plaintiff,
AGAINST
AMERICAN SURETY COMPANY OF NEW YORK,
Defendant.

Action No. 2.
Collins, President. 140

A verdict having been rendered in the above entitled action in favor of the plaintiff and against the defendant, and the defendant having thereupon moved for a new trial upon the minutes of the Court and the exceptions, and on the grounds that such verdict is contrary to law and to the evidence, and such motion having been heard, it is, on motion of plaintiff's attorneys, 141

Ordered, that such motion be and the same is hereby denied; and it is on motion of defendant's attorneys, further

Ordered, that all proceedings on the part of the plaintiff be and they hereby are stayed for thirty days; that after the expiration of said thirty days, plaintiff shall be at liberty to adjust his costs and enter judgment; that all further proceedings on

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142 plaintiff's part be stayed thirty days after entry of such judgment, and that defendant have thirty days after such entry of judgment to prepare and file and serve a bill of exceptions and assignments of error.

WM. J. WALLACE.

(Endorsed)—United States Circuit Court, Southern District of New York.—Frederick N. Pauly, as Receiver of the California National Bank of San Diego, California, Plaintiff, against American Surety Company of New York, Defendant. —Action No. 2.—Order Denying Motion for New Trial.—Henry C. Willcox, Attorney for Defendant, No. 160 Broadway, New York City. N. Y.—U. S. Circuit Court.—Filed Oct. 23, 1894, —John A. Shields, Clerk.

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UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California, Plaintiff,	Action No 2.
144 AGAINST	
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.	

The issues in this action having been brought on for trial before Hon. William J. Wallace, United States Circuit Judge, and a jury, at a Stated Term of this Court, held in and for the Southern District of New York, in the Second Circuit, at the United

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States Court Rooms in the City of New York, on 145
the 19th day of October, 1894, and said trial having been continued on the 22d, 23d, 24th and 25th days of October, 1894, and the plaintiff herein appearing by Mitchell & Mitchell, his attorneys, and William Mitchell and Edward W. Paige, of counsel, and the defendant herein appearing by Henry C. Willcox, its attorney, and George A. Strong, of counsel, and the issues having been tried, and the jury after hearing the evidence of the respective parties, the argument of counsel and the instructions of the Court, having on the 25th day of October, 1894, rendered a verdict for the plaintiff for the sum of twenty-eight thousand one hundred and four dollars and sixteen cents 146
($28,104.16), and the costs of the plaintiff having been duly adjusted at one hundred and seven $\frac{86}{100}$ dollars, and the interest on said verdict having been adjusted at three hundred and nine and $\frac{14}{100}$ dollars; now, on motion of Mitchell & Mitchell, attorneys for the plaintiff, it is

Adjudged, that the said plaintiff do recover of the said defendant the sum of twenty-eight thousand one hundred and four dollars and sixteen cents ($28,104.16), found by the jury, and one hundred and seven $\frac{86}{100}$ dollars costs, and three hundred and nine $\frac{14}{100}$ dollars interest on verdict, amounting in all to twenty-eight thousand five hundred and twenty-one $\frac{16}{100}$ dollars ($28,521.16), and that said plaintiff have 147
execution therefor.

Dated December 31, 1894.

(Sgd.) GILBERT E. ROGERS,
Deputy Clerk.

(Endorsed)—U. S. Circuit Court, Southern Dist. of N. Y.—Frederick N. Pauly, as Receiver, &c., Plaintiff, against American Surety Company of New York, Defendant.—(Action No. 2).—Judgment.—Mitchell & Mitchell, Attorneys for Plaintiff, 44 & 46 Wall Street, New York City. —Filed Dec. 31, 1894, 4 P. M.

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148 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California, Plaintiff, AGAINST AMERICAN SURETY COMPANY OF NEW YORK, Defendant.	Defendant's Bill of Exceptions. Action No. 2. (Collins, President).

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Be it remembered that afterwards, to wit, on the 19th, 23d, 24th and 25th days of October, 1894, at the Circuit Court of the United States for the Southern District of New York, held in the City of New York, in the said District, before the Honorable William J. Wallace, Circuit Judge, the issues joined in the above stated cause came on to be tried by a jury for that purpose duly empanelled, in the presence of William Mitchell and E. W. Paige, of counsel for the plaintiff, and George A. Strong and
150 Henry C. Willcox, of counsel for the defendant.

Mr. Mitchell opens the case on behalf of the plaintiff.

Plaintiff amends his bill of particulars by omitting all of sixth after first paragraph and inserting in lieu thereof, that the date of the dismissal or retirement was the first of March, 1892; that the acts of fraud and dishonesty referred to in paragraph 9 of said complaint were discovered between the 1st and 23d of May, 1892; and amends his complaint by striking out paragraphs 10 and 11 and inserting in lieu

thereof, that between the 22d day of May, 1892, 151
and the 18th of June, 1892, and again on the 24th of June, 1892, and as soon as practicable after the discovery of the aforesaid wrongful acts of the said Collins, this plaintiff duly notified the defendant in writing at its office in the City of New York, and on the 24th of June, 1892, and as soon as practicable after the discovery of said acts, presented to the defendant a claim in writing for the losses occasioned by such acts of the said J. W. Collins. And the plaintiff has duly performed all the acts and things which the employer in and by said bond was obligated to do; all of which notices and claims were received and accepted by the de- 152
fendant as in all things sufficient and in time. Plaintiff thereupon duly demanded from defendant that it make good and reimburse to plaintiff the sum of $25,000 and interest towards the amount of pecuniary loss sustained by said plaintiff by said acts.

And thereupon the plaintiff, to maintain the issues on his part, reads in evidence the return of the marshal showing the service of the summons and complaint in this action on the defendant on the 8th of May, 1893.

CHARLES L. BRIMHALL, sworn and examined as a witness for plaintiff:

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DIRECT-EXAMINATION by Mr. Mitchell:

In the year 1891 I was bookkeeper for the California National Bank of San Diego, and had been engaged in that capacity for about three years. In that year, 1891, I kept as such bookkeeper the ledger account of J. W. Collins with the bank. Mr. Collins was the president of the bank, and I think had been such since January 1st of that year. This book shown me is the deposit ledger of the California National Bank. It contains the account of J. W. Collins with the bank. George N.

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154 O'Brien was the cashier of that bank, and had been such from the 1st of January, 1891. The teller was S. C. Gregg.

It is admitted by both parties that S. C. Gregg, of whom the witness speaks, died on or about the 30th of July, 1894.

Mr. Gregg was receiving and paying teller both. I saw Mr. Gregg transact his business as teller. My desk was right back of his, so that I could see what transpired. When checks were paid they were stamped and put on a spindle, or in a basket; and when money was received it was put in the till with the other money. There were two spindles, one for
155 receiving tags and the other for holding checks; and when cash was paid in, if he received any money, he put it on one side, and on the other side he kept the checks that were received by him and paid. There was a stamp that was put on the checks which were paid by the teller. I have the account of Mr. Collins with the bank; it was on page 120 of this book. That account is made up of debits and credits. In the regular course of business, after Mr. Gregg got the checks or deposit tags, the checks and deposits were handed in to the bookkeepers and they made the entries from the checks and deposits into this book. This book contains a correct account of the transactions of Collins with the bank. The entries there were made by reason of checks of Collins that
156 were handed to me, and the credits were got from the tags which I received, and those were entered at or about the same dates and for the amounts as stated.

Plaintiff's counsel offers the account referred to in evidence. Objected to as incompetent, immaterial and irrelevant and not sufficiently proved. Objection overruled. Exception by defendant.

Q. Will you please look at the date of September 21, 1891, and state what the apparent balance in that account is?

Same objection, ruling and exception.

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Questioned by the Court: 157

I was not the only bookkeeper; Mr. Rogers kept with me on the deposit book, so that the ledger entries were made by Mr. Rogers and myself co-operating at the same time.

Questioned by Mr. Strong:

I knew nothing about the transaction itself; I made my entries from certain memoranda handed to me. In the case of a credit to an account I would receive a deposit slip, which stated that so much money had been deposited. I did not know of my own personal knowledge whether so much money had or had not been deposited. In the same way in 158
regard to a charge, I would make it from checks which would be handed to me, and I would not know whether or not all of these checks had been paid of my own knowledge. The stamp to which I have referred was usually affixed to checks the same day, and by the teller. In a few cases I affixed it—occasionally, but not as a rule. I did not know of my own knowledge when he did affix it, only that they would be stamped before they came to me, and they usually came to me the same day. The ledger account of each individual was posted every day. I think that account is in the same condition it was when the bank went into the hands of the Comptroller of the Currency, ex- 159
cept that I think there are one or two postings after the bank closed. There were some entries made after the bank closed, I think, by Mr. Rogers, under the instructions of the Receiver. In this book the account is in the same condition that it was before the Receiver took possession. No entries were made in this book after the bank closed. The whole account is not contained in this book; there is some more in the other book. The account is contained in the other book, and those entries were made in the second book. The second book is ledger No. 5,

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160 this is ledger No. 4, and the new entries, after the receivership, were all made in ledger 5.

Questioned by Mr. Mitchell:

The new entries to which reference has been made are the last two entries in the account.

Plaintiff offers book described as ledger 5 also in evidence as a continuance of the other. Defendant objects to both of them on all the grounds specified before, and to this one in particular on the ground of the additions that have been made to the account.

161 The Court: That does not vitiate the book. Of course, there will have to be some explanation made of these entries which were made out of the usual course of business.

Mr. Mitchell: I offer to do that now.

Q. State what you know about those entries that were made after the suspension of the bank? A. I know that they are charged up here, one as——

Defendant objects to the witness stating what the entry is.

The Court: Let him state, because it will come out.

Objection overruled. Exception by defendant.

162 The Witness: One is January 14, 1892, is a charge of $350. That regular ledger account was closed on November 11, 1891.

Q. What was the seeming balance at that time, November 11, 1891?

Same objection, ruling and exception.

A. $11,420.90 credit. There was an apparent credit balance of that amount at that time.

Q. Do you find on the credit side of that account, on or about the 13th day of October, a credit of $24,000? Just read what you find.

Objected to as incompetent, immaterial and irrelevant; that the books are no evidence against this defendant; that it does not appear that this item and amount which the witness is asked to read, was mentioned in the proof of claim in this action, and that it is not shown to have been procured by Mr. Collins, as alleged in in the bill of particulars. 163

The Court: I overrule the objection.

Mr. Strong: I think he ought to put in his proof of claim.

The Court: You can get your ruling when the proof of claim is in. If it is not in the proof of claim you can present the question.

Exception by defendant. 164

A. A credit of $20,000 marked "Western National," and $24,500 marked "U. S. National."

Defendant's counsel moves to strike out the answer on the ground that it does not appear that any claim was served upon the company in respect to these items.

Motion denied. Exception by defendant.

Plaintiff's counsel offers in evidence notice and proof of claim, dated June 24, 1892, directed to the American Surety Company of New York.

Plaintiff's counsel offers in evidence proof of loss of June 24, relating to claim on the Collins bond, receipt of which, on or about July 1, 1892, is by defendant admitted. Same marked Plaintiff's Exhibit 1. 165

Defendant moves to strike out the testimony in regard to the credit of $20,000 and $24,500, claimed to have been made on the books of the California National Bank at San Diego, on all the grounds before mentioned and on the further ground that the plaintiff cannot in his testimony go beyond the United States National

166 Bank and Western National Bank, under the allegations of his proof of claim, but that he must show that Collins embezzled or dishonestly and fraudulently misappropriated the money loaned by said bank.

Motion denied. Exception by defendant.

"By Mr. Mitchell:

"Q. What, if any credits, do you find to Collins' account on the 13th and 14th of October?

Same objection, ruling and exception.

"A. Two credits here, one of $20,000 and one of $24,500.

167 "Q. What is the full entry there? Is there anything in lead pencil on either one of those?"

Same objection, ruling and exception.

"A. One marked 'The Western National, is for $20,000.'

"Q. And the other?"

Same objection, ruling and exception.

"A. 'U. S. National $24,500.'" There is no other credit entry under that same date. There is one on the 14th of $500—the source is not given here.

This book now shown me is the teller's book of the California National Bank. This paper now shown
168 me is a deposit slip in the handwriting of George N. O'Brien. It is a deposit tag I posted into the ledger.

Deposit tag referred to offered in evidence by plaintiff.

Objected to on the ground that it is incompetent, immaterial and irrelevant, as being a mere statement or declaration of Mr. George N. O'Brien and therefore not evidence against the defendant in this action; on the ground that it does not appear to have been written by Mr. O'Brien by the procurement or directions of Mr. Collins;

and on the ground that it does not appear when 169
the paper was written.

The Court: You cannot prove it all at once. The first thing is to show what was done; then we can find out whether it was done by his procurement.

Objection overruled. Exception by defendant.

Deposit tag referred to, dated October 14, 1891, $500, California National Bank of San Diego. Marked Plaintiff's Exhibit 2.

Plaintiff's counsel offers in evidence deposit tag, dated October 13, 1891, to the credit of J. W. Collins for $24,500. Same objection, ruling and exception. Marked Plaintiff's Exhibit 170
No. 3.

Plaintiff's counsel offers in evidence deposit tag, dated October 13, 1891, to the credit of J. W. Collins for $20,000.

The Court: These slips are filled out in the handwriting of the cashier of the bank.

Same objection, ruling and exception. Marked Plaintiff's Exhibit No. 4.

The paper now in my hands is a deposit slip dated October 14, 1891, to the credit of J. W. Collins, for the amount of $500, in the handwriting of George N. O'Brien.

Questioned by Mr. Strong: 171

I do not remember except from the looks of this slip, not personally; that is, this special one, when it was made. I am not sure that I saw Mr. O'Brien write it, and I only know when he wrote it from the date of it and from the appearance of the paper, but I do not know of my own personal knowledge when he wrote it, about that time, about that date.

Defendant's counsel moves to strike out the paper, on the ground that it is not sufficiently proved. Motion denied. Exception by defendant.

172 Questioned by Mr. Mitchell:

I received it on the 14th and posted it into the ledger on the day it bears date.

Questioned by Mr. Strong:

I know I received it then, and made the entry, because I made the entry from it. I made them all. I know I received that particular one from the fact that I saw it there. I have no recollection specially of this single paper. I could not have made that entry from another tag. I know that from the postings and marks that were given on the books; memorandums that I made on them. It might
173 have been made, however, from another tag, if it had been made the same as this one. I know, however, it was made from this one, because we always pinned them together and kept them just as we had them when we post them.

Questioned by the Court:

Our practice was to pin the slips together before we posted them, and then we posted them direct from these into the ledger. We fastened them together as you see them now, with a pin; that is, all the slips for one day were pinned together, and the bookkeeper took them and made the appropriate entries in the ledger. The slips were then filed
174 away in the vault of the bank. To my knowledge this slip came through the teller.

The examination of the witness is suspended for the purpose of examining Mr. Pauly.

FREDERICK N. PAULY, sworn and examined as a witness for the plaintiff:

Questioned by Mr. Mitchell:

I am the plaintiff in this action. These papers now shown me are deposit slips of the Calfornia National Bank of San Diego. I received them from the National Bank Examiner. They were turned

over to me with the other papers, effects and assets of the California National Bank by the National Bank Examiner; and at the same time these deposit tags were turned over I also received these books marked in evidence—the ledger and the teller's book. These five checks were delivered to me by the National Bank Examiner. 175

The five checks are marked for identification B, C, D, E and F.

The witness produces two notes, which are marked for identification Exhibits G and H.

CROSS-EXAMINATION by Mr. Strong:

I received these papers from the National Bank Examiner on the 29th day of December, 1891. I first saw them a few days prior to that date. 176

Questioned by Mr. Mitchell:

So far as I know, this bundle of deposit tags is in just the same condition in which I received it.

CHARLES L. BRIMHALL, recalled:

EXAMINATION continued by Mr. Mitchell:

I recognize this as a bundle of tags which I received on or about the day they bear date, in the regular course of my employment as bookkeeper, and from which entries were made. This is the tag (indicating) from which I made the entry on November 13th to the credit of Collins. 177

The Court: Those are the tags you have read, Mr. Mitchell? Yes.

Plaintiff's counsel offers the paper in evidence.

Questioned by Mr. Strong:

I remember those two more distinctly than this other one. As to the entry I made on the ledger of

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178 $24,500, I had a tag with that amount on it. I remember that the notations were the same as these. By notations I mean the marks showing where they were from. I remember that. When I testified a moment ago that I had no present recollection, I referred to this other one of $500. I had no recollection whatever of that one. I do not mean to say that I had no personal recollection of the larger one. As to the larger one, I remember posting amounts from that into the ledger on these dates. The amounts struck me on that day as peculiar about the transaction; they were good-sized ones. There were a good many good-sized amounts in that account.

179 Defendant's counsel moves to strike out the evidence about the tags on the ground that it does not appear by the testimony of this witness that they were the tags from which the entries were made on the ledger on the 13th and 14th of October.

Objection overruled. Exception by defendant.

Questioned by Mr. Mitchell:

I have already identified the deposit slip now shown me as in the handwriting of George N. O'Brien, cashier.

180 Plaintiff's counsel offers in evidence the deposit slip last referred to.

Objected to on the ground that it is merely Mr. O'Brien's declaration or statement and that it is not sufficiently proved.

Objection overruled. Exception by defendant.

Marked Plaintiff's Exhibit I, previously marked Plaintiff's Exhibit 4.

The deposit slip now shown me is in the hand writing of George N. O'Brien.

Plaintiff's counsel offers the deposit slip in evidence.

Same objection; also on the further ground that the final answer of the witness is that he has no recollection about it. 181

Objection overruled. Exception by defendant.

Marked Plaintiff's Exhibit K, previously marked Plaintiff's Exhibit 3.

This deposit slip is also in the handwriting of George N. O'Brien.

Plaintiff's counsel offers the deposit slip in evidence.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit L, previously marked Plaintiff's Exhibit 2.

From these different deposit tags which have been received in evidence I made entries in the ledger account to the credit of J. W. Collins in the regular course of business, as they now appear there in their regular chronological order. This book is the regular teller's book of the plaintiff's bank, kept by Mr. Gregg, the teller. This book was kept by Mr. Gregg. There are different handwritings in it, some. Those figures down at the foot of the page, additions and summaries from day to day are in the handwriting of Mr. Gregg, and the detailed specification of what those summaries consist of, are some, in the handwriting of Harry O'Brien. The entries at the foot of the page, specifying the details of the cash on hand, are in Mr. Gregg's handwriting. This is the record of all the cash transactions during the day from which the balance is made up of cash at night. Those entries were made during the day, and, of course, these footings were made at the end of the day. Entries were made during the day by the teller as he received deposits. The teller did not make all the entries in the body of the page. He made the footings, but not all of these in here (indicating). Harry O'Brien, the note clerk, wrote part of the body of the page, and he made the exchanges for the dif- 182 183

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184 ferent banks and the drafts. This is the teller's book which Mr. Gregg kept. There was not any other book kept by him as receiving or paying teller besides this unless the one previous to this of the same kind. He made daily entries in this book of the debits and credits. Here are several entries of his own handwriting. All these were made under his direction—including those under date of September 22—they were made in his presence. The certifications of the additions were made by him, and the statement of what the cash balance consisted of on each day was made up by him.

Questioned by Mr. Strong:

185 Mr. Gregg did not personally make all these entries in the body of the page. There are a great many which he did not make. Mr. Harry O'Brien made some of them—possibly I made some of them in here, listing the checks, the amounts. The figures at the bottom of the page which Mr. Gregg made are additions showing the cash on hand, the amount. Some of the additions of the body of the page are in his handwriting. The others were the amount of cash on hand and the balance brought forward. I say Mr. Gregg directed these to be done, because he had charge of them; he had charge of the books. I was present when he gave directions as to some of these entries. He directed me to list
186 the checks and deposits, and I think he directed others to make some. I recognize the handwriting of all the different figures. Some of them are in my handwriting.

Plaintiff's counsel offers the teller's book in evidence.

Objected to on the ground that it has not been sufficiently proved by what witness has said to entitle it to be received in evidence, and as incompetent, immaterial and irrelevant. Objection overruled. Exception by defendant.

The teller's book is marked Plaintiff's Exhibit 5.

Questioned by Mr. Mitchell: 187

I know what that entry under date of September 22 "Certificate" means. The signature to the check now shown me is that of J. W. Collins.

"Q. I hand you four checks and ask you by whom those were signed? (Handing witness papers.)"

Objected to as incompetent, immaterial and irrelevant; that they are not mentioned in the proof of claim or bill of particulars; that they are not shown ever to have been paid; also that they relate to transactions prior to the bond. Objection overruled. Exception by defendant.

"A. Signed by J. W. Collins." 188

Plaintiff's counsel offers in evidence a check dated May 25, 1891, for $25,000, on the California National Bank of San Diego, to the order of C. D., signed J. W. Collins.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit 6.

Q. Was that check ever charged against J. W. Collins in the account?

Same objection, ruling and exception.

A. I don't think it was. None of these checks ever got to me as bookkeeper from the teller.

Q. It has not been entered against Collins' account? 189

Same objection, ruling and exception.

A. No, sir.

Q. The next one is July 20, 1891. Was that check ever charged against Mr. Collins' account?

Same objection, ruling and exception.

A. No, sir.

Plaintiff's counsel offers in evidence check dated July 20, 1891, on the California National

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190 Bank to the order of C. D. for $20,000, signed J. W. Collins.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit 7.

Plaintiff's counsel offers in evidence check dated September 16, 1891, on the California National Bank to the order of C. D. for $15,000, signed J. W. Collins.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit 8.

Q. Was that ever entered against J. W. Collins?

191 Same objection, and also that it does not appear that it was ever omitted by Collins' procurement. Objection overruled. Exception by defendant.

A. No.

Q. Did you ever receive as bookkeeper from the paying teller these last few checks which have been offered in evidence?

Same objection, ruling and exception.

A. No, sir. The body of the two papers that have been marked for identification G and H is in the body the writing of Harry O'Brien, and the signature is J. W. Collins.

192 Plaintiff's counsel offers in evidence note dated August 22, 1891, for $51,038.35 to the order of the California National Bank, signed by J. W. Collins.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit 9.

Plaintiff's counsel offers in evidence note dated September 15, 1891, for $6,659 to the order of the California National Bank, signed by J. W. Collins.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit 10.

The Court: Are those notes endorsed? 193

Mr. Mitchell: No, sir; they are not endorsed by anybody.

A Juror: Were they discounted?

Mr. Mitchell: No, sir.

Mr. Willcox: There is no proof on the subject. We are without any explanation as to these notes.

Mr. Strong: May I call your Honor's attention to the fact that neither one of them was due at the time of this credit of October 13th and 14th.

The Court: Is there any entry in Collins' account showing the credit of these notes?

Mr. Mitchell: No, your Honor.

The Court: What is your object in introducing them? 194

Mr. Mitchell: It is a recognition by him of indebtedness to the bank at that time, which promised to pay six and eight months from date respectively. It bears on the point of showing his indebtedness to the bank.

Mr. Strong: It does not bear on the point of showing any impropriety in these credits of October 13th and 14th. I move to strike them all out on the grounds heretofore stated.

Mr. Mitchell: The plaintiff tells me they are among the discounts of the bank, these notes.

The Court: They were discounted?

Mr. Strong: All that would not show that there was an impropriety in receiving them and in giving the credit of October 13th and 14th. 195

The Court: I suppose the plaintiff would have a right to the argument that if he made out a balance of $30,000 or $40,000 at the bank he would not have given his notes to borrow money.

Mr. Strong: But these are prior to the balance. The balance we stand on is the balance that appeared on October 13th and 14th, and these are prior to that. A man might well make a deposit in a bank if he had previously had notes discounted there.

The Court: I will allow the evidence. I do not see myself that it is of much value.

Motion denied. Exception by defendant.

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196 CROSS-EXAMINATION by Mr. Willcox:

On the 12th day of November, 1891, there were in the employ of the California National Bank of San Diego, five clerks: S. C. Gregg, George N. O'Brien, H. E. O'Brien, W. B. Rogers, J. E. Keller and myself—that makes six. D. D. Dare was vice-president of the bank. I was in the employ of the bank on the 22d day of September, 1891. I do not remember whether Mr. Collins was in San Diego on that day. I do not remember whether Mr. Collins left San Diego in the latter part of September, 1891. I know he was away from the bank for two months or more, immediately prior to its failure, but I do not remember the day he went. I think he came back
197 sometime in October. I do not know that it was on the night on the 4th of November, 1891. Recollection is that he got back some time along about that time. I don't know the date exactly. He was away from San Diego six or eight weeks I think, and according to that he was certainly away on the 13th and 14th of October, 1891, and he was also away, as near as I can recollect, on the 31st of October, 1891. The directors of the bank, as I recollect them, were J. W. Collins, D. D. Dare, Mr. Pulsifer, Mr. Havermale, Mr. Burns and Mr. Gay. Mr. Pulsifer lived at that time in the East; I don't know what place. He did not live in San Diego. I have seen him there
198 at times. I do not remember what time of the year it was or what year it was, but I know he was there a couple of times. It is a fact that Mr. Pulsifer was not in the habit of attending to any of the business of the bank during the summer and early fall of 1891. It is also true that Mr. Dare was absent from San Diego during the summer and early fall of 1891. I think Mr. Havermale was sick in the month of October, 1891, and confined to his home. Mr. Collins, the other director, was away. During that time Mr. George N. O'Brien and his assistant clerks had charge of the bank. Mr. O'Brien was about

twenty-one years of age, I think. Before he was 199
elected cashier he was stenographer and typewriter—correspondent. While Mr. O'Brien was stenographer Mr. William Collier was president. Mr. Collier had been president up to the time Mr. Collins was elected president, and during the time Mr. Collier was president Mr. Collins was cashier and Mr. George O'Brien was stenographer and typewriter. I think about January, 1891, there was an election of officers of the bank and at that time Mr. Collins was elected president and Mr. George O'Brien was elected cashier. I did not notice, however, that there was any real change after that election in the management of the bank.

200

Questioned by the Court:

After that Mr. O'Brien began to act as cashier. There were directors' meetings held in the bank during the years 1890 and 1891; I never attended one though. I do not know what directors did attend. I have seen directors there. I saw Mr. Havermale, Mr. Burns and Mr. Gay. I don't know that any of the directors took any actual personal participation in the management of the bank. They would come in there quite often, but I don't know whether they ever looked over the books and securities.

Questioned by Mr. Willcox: 201

I don't know of any investigations of the affairs of the bank made by the directors. I was in the employ of the California National Bank going on three years, from March 1, 1888, until its close. I think the bank was organized in the latter part of 1887, and commenced business January, 1888. I think Mr. John W. Collins and Mr. Dare were organizers of the bank. Mr. Collins was a stockholder, but I don't know to what extent. I think he was one of the largest stockholders of the bank.

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202 The Court: He was a large stockholder, I assume?

Mr. Mitchell: I don't remember now. I think he was a large stockholder.

The Court: Let it go in that he was a large stockholder.

EXAMINATION continued by Mr. Willcox:

I kept Mr. Collins' account in the books of the bank. It was not, to my knowledge, used for any other than Mr. Collins' private transactions. I was examined as a witness on behalf of the plaintiff in this action at San Diego, California, in the month of August, 1894, and was sworn to tell the truth. The
203 plaintiff was represented by Judge Luce as his counsel. The testimony given by me in that deposition was true to the best of my knowledge.

Q. I read to you from your deposition this question and answer, at page 70: "Q. Was not Mr. Collins' account used as a clearing house for the bank? A. I had not thought of it before, but I suppose you might use it in those terms?" Do you remember that question and that answer? A. I do.

Q. Do you recollect making that reply? A. I do.

Q. Was not that true? A. I think that an explanation of that answer was given later.

Q. Was not that reply, as you then made it, true? A. Yes, sir.

204

By the Court:

Q. What do you mean when you say it was used as a clearing house? A. I did not understand the exact meaning of the words and so I supposed.

Q. You had some idea when you said the account was so used. What did you mean by it? You must have meant something. A. In regard to those credits I thought that perhaps there were some of those credits that ought not to have been there. That is why I made that answer.

By Mr. Willcox: 205

Q. I read you another question· "Q. To pass things into his account and out of his account that were really for the interests of the bank and not Mr. Collins was an every day transaction, was it not? A. I think so." Do you remember that question and that answer? A. Yes, sir.

Q. The next question: "Don't you know so? A. Well, I knew from the appearance of things. Q. You knew so from the facts surrounding the transaction? A. Yes." Do you remember those questions and answers by you made? A. Not distinctly.

Q. Haven't you any recollection of so testifying? A. Yes, sir; I have.

Q. The next question: "Q. You made the entries 206
in Mr. Collins' account in the books. A. Yes, sir. Q. Is it not a fact that it was by you, at the time of your employment in the California National Bank, known that Mr. Collins' account was commonly known as the 'waste basket'? A. No." Do you remember that question and that answer? A. Yes.

Q. "Q. Or by some such similar term? A. No, sir. Q. Still you do remember that his account was used for many transactions of the bank in which he apparently had no interest? A. Yes, sir." Do you remember that? A. Yes, sir.

Q. You remember so testifying? A. Yes, sir.

Q. "Q. You draw a distinction, do you not, between items properly chargeable to Mr. Collins' 207
account and items chargeable against *him?* A. Yes, sir." Do you remember that? A. Yes, sir.

Q. "Q. So when you say that Mr. Collins' account was not to your knowledge charged with items not properly chargeable against that account you do not mean, do you, that they were properly chargeable against him? A. I do not mean that they were properly chargeable against him." Do you remember that testimony? A. Yes, sir.

Q. "Q. Is it not true that his account was often charged with items sometimes for the purpose of

getting a transaction off the books, which was placed there for the convenience of the bank? A. Yes, sir." Do you remember that testimony? A. I think I do; yes, sir.

Q. Was it true? A. I think so.

Questioned by the Court:

I mean by "transaction" the same as any other transaction of the bank; the cash transactions; entries that we had to make.

Questioned by Mr. Willcox:

I think there were some transactions that were carried on in Collins' name for the benefit of the bank.

Questioned by the Court:

I don't remember any particular instances. I refer to some of the larger amounts, deposits and checks and large entries—large entries in his account. I mean to say as to them that I do not know anything particularly about the transactions themselves; all that I know or thought from it was the supposition that they were for the interests of the bank. I do not mean to say that I ever had any knowledge of any items which were charged to Mr. Collins' account, which really should have been charged to the bank or represented debits of the bank? Those questions were put in such a shape to make me answer as I supposed. I did not know actually anything about the actual transactions. I did not know what they were, but I supposed from some of the entries that they should have been made differently.

Questioned by Mr. Willcox:

I think my testimony given here yesterday has not been given on the theory of my suppositions. I think I testified to what I knew yesterday and have so testified to-day; testified to what I know. When I testified that those questions had been put to me

and I made the answers which were recorded, and I answered that I gave that testimony and that it was true, I meant that it was as I supposed. I live in San Diego; I arrived in New York last week; nobody came with me. I met Mr. Pauly the same day I arrived. I have been with him a part of every day since then except Sunday. 211

Q. Going over these books and papers of the California Bank? A. No; I was only over for a little while part of the day. I do not know that the California Nationel Bank while it transacted business often borrowed money itself. I do not know that it procured its paper to be rediscounted. The paid checks of the bank were, in the ordinary course of business, stamped paid. I know some of them had been actually paid; I supposed all of them were. If they were handed in to the bookkeeper to be charged up they were supposed to be paid. This check shown me, dated November 9, 1891, to the order of the California National Bank, apparently signed by J. W. Collins, for $19,500, is stamped paid of date February 2, 1892. 212

Mr. Paige: I admit that that stamp was put on that check by the expert accountant of the Receiver, five weeks after the Receiver took possession, and has nothing to do with the transaction. We are going to show, when our time comes, if we can, that that check was a part of the cash items; that is to say, it was carried in the teller's desk and represented on the books of the bank as gold, greenbacks and national bank notes, and when the Receiver's expert wrote up Mr. Collins' book, on the 2d of February, they made one of the two additional entries which this witness has sworn were made after he stopped making entries in that book, and they stamped that check as it is. 213

CROSS-EXAMINATION continued:

I do not know whether there were other checks which had been stamped paid which had not been paid. Upon the ledger which contains the entry of

214 which I have testified of the credit on October 13, 1891, of $24,500 turned to in the account of the United States National Bank of New York, and find a charge against that bank of an equal sum on that day. I did not keep that book—it was kept in the bank and by the double entry system, consequently, where there was a charge to the United States National Bank on that day there must be a credit somewhere. I find in Mr. Collins' account of the same date a credit of $20,000, of which I have spoken in connection with the Western National Bank, and I find on that day in the account of the Western National Bank a charge against that bank of the same sum.

215 Plaintiff's counsel offers general ledger in evidence.

Objected to as incompetent, immaterial and irrelevant; that it is not in itself evidence against this defendant or even against Mr. Collins, and that no sufficient evidence has been given to make it admissible.

Objection overruled. Exception by defendant.

The Witness: There having been a charge to that bank on that day there must necessarily, under the system of booking which prevailed in that bank, have been a credit.

Questioned by a Juror:

216 There were not two accounts of Collins.

Questioned by Mr. Mitchell:

There was no business account of Mr. Collins separate from this account.

Questioned by Mr. Willcox:

Mr. Collins gave direct instructions to the clerks of the bank while he was president.

REDIRECT-EXAMINATION by Mr. Mitchell:

The signature to the paper shown me is in the handwriting of J. W. Collins; it is a check for

$19,500. I saw it in with the cash. I do not re- 217
member how long; it seems to me somewhere in the neighborhood of a week prior to November 11, 1891. That stamp in red letters was not then there.

Plaintiff's counsel offers in evidence deposit tag dated March 25, 1891, for $25,000, National Park Bank.

Objected to as incompetent, immaterial and irrelevant; not mentioned in the proof of claim or bill of particulars; not shown to have been procured by Mr. Collins; prior even to the date of the bond in suit; that it is a mere declaration of the person who wrote it, and not in any way admissible against the defendant. Objection 218
overruled. Exception by defendant.

Marked Plaintiff's Exhibit 11.

Plaintiff's counsel offers in evidence deposit tag dated May 2, 1891, for $40,000, Brunnell & Co., Chicago.

Objected to on the same grounds as before and on the further ground that it is said to be in the handwriting of H. E. O'Brien. Same ruling and exception.

Marked Plaintiff's Exhibit 12.

Mr. Mitchell: All the deposit tags are offered and received in evidence. They are all in the handwriting of George N. O'Brien except the deposit tag of 219
May 2, 1891, for $40,000.

GEORGE S. HICKOCK, sworn and examined as a witness for the plaintiff:

Questioned by Mr. Mitchell:

In the year 1891 I was and still am cashier of the National Park Bank of New York. We had a transaction with the California National Bank of San Diego on the 25th of March, 1891.

Q. State what the transaction was?

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220 Objected to as incompetent, immaterial and irrelevant; that it antedates the bond; that it is not mentioned either in the proof of claim or the bill of particulars; that it is in no way admissible or sufficient to charge the defendant with any loss under the bond. Objection overruled. Exception by defendant.

A. On that day the Park Bank loaned the California National Bank of San Diego on a note of $25,000. The note was made by J. W. Collins, S. G. Havermale and William Collins, a joint note. We had no other security on that transaction.

Questioned by the Court:

221 We discounted that note for the California National Bank, the note made by the three parties jointly, for $25,000.

Questioned by a Juror:

It was credited to the account of the bank. It was discounted for the bank.

Questioned by the Court:

It was endorsed by the California National Bank and made by Collins and those parties mentioned and went to the credit of the California National Bank, the general account.

222 Questioned by Mr. Mitchell:

That was checked out.

Questioned by the Court:

I have not the notes, but I suppose they were endorsed by Collins as president. That is the usual way of endorsing by a bank.

Questioned by Mr. Mitchell:

The paper now shown me is the note.

Plaintiff's counsel offers in evidence a note dated April 1, 1891, for $25,000 to the order of

the National Park Bank of New York, the signatures being torn off; said to have been made by Collins, Havermale & Dare. 223

Same objection, ruling and exception.
Marked Plaintiff's Exhibit 13.

That credit was given to the bank, not to J. W. Collins. We had a transaction with the California National Bank on the 10th of June, 1891.

Q. What was the transaction?

Same objection, ruling and exception.

A. We on that date discounted for the California National Bank of San Diego $20,000. In this case it was their own note, endorsed by J. W. Collins and S. G. Havermale; a $30,000 bond as security, of the San Diego Cable Railway. 224

Questioned by the Court:

We discounted a $20,000 note, and gave the bank credit for $19,815.89, being the amount of the note less the interest.

Questioned by Mr. Mitchell:

This is the note.

Plaintiff's counsel offers in evidence deposit tag dated June 6, 1891, for $20,000 National Park Bank, credit J. W. Collins.
Same objection, ruling and exception. 225
Marked Plaintiff's Exhibit 14.

This note was also paid by our bank; it was checked out.

Plaintiff's counsel offers in evidence note dated June 3, 1891, for $20,000 to the National Park Bank of New York, signed California National Bank of San Diego, per J. W. Collins, President.

Same objection, ruling and exception.
Marked Plaintiff's Exhibit 15.

226 I think our bank has received one or more dividends from the Receiver of the California National Bank on the total amount of the indebtedness. I have not the book before me to show what the dividends are.

Questioned by Mr. Strong:

I think the last dividend was within six months past; I cannot remember when the first was paid. I should say within a year.

HENRY A. SMITH, sworn, and examined as a witness for the plaintiff.

227 Questioned by Mr. Mitchell:

In the year 1891 I was and still am cashier of the Western National Bank of New York. Our bank had dealings with the California National Bank of San Diego on or about the 13th or 14th of October, 1891.

Q. Will you please state what that transaction was?

Same objection as stated to a similar question put to the previous witness. Same ruling and exception.

A. The bank made a loan to the California National Bank of San Diego of $20,000. I think that
228 loan was made October 12th. By the way, I don't know where our books are; they were sent down here.

Questioned by the Court:

We credited the account of the California National Bank with the proceeds of the $20,000 loan.

Questioned by Mr. Mitchell:

That was the only loan we made; and that loan was by our bank to the California National Bank and not J. W. Collins. Our bank did not have another transaction with the California National Bank

on or about the 31st of October in the nature of a loan. There was only one loan. That was the loan I stated about the 12th. The proceeds went to the credit of the California National Bank and it was checked out in the ordinary course of business (witness examining his bank's books which are now in Court). The date was October 12th. The amount passed to the credit of the California National Bank was $19,690 on promissory notes amounting to $36,250. 229

Questioned by Mr. Mitchell:

That paper shown me seems to be the original note of $20,000. This is the note of the California National Bank of San Diego by J. W. Collins, president, guaranteed and endorsed by Collins individually. That credit was given to the bank, not to Mr. Collins. We have received dividends on that loan from the Receiver, I think, to the extent of about 35 per cent. 230

Plaintiff's counsel offers in evidence a note dated October 12, 1891, for $20,000, signed California National Bank, per J. W. Collins, President.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit 16.

231

Questioned by the Court:

This discount of the $20,000 note was made by the bank, and the note was endorsed by Collins and secured by other notes, which we assumed to be bank paper.

CROSS-EXAMINATION by Mr. Strong:

The proceeds were credited to the bank and drawn out in the course of time and in the usual way. I cannot say just when we made a claim on this against the Receiver. I have no memorandum to

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232 show. Our assistant cashier may be able to show: he had charge of proof of claim. This paper now shown me is the affidavit signed by me, verified by me, and was made at the time the verification bears date—March 5, 1892, and, I presume, was sent to the Receiver at that time. The claim was finally allowed. I believe there was some objection by the Receiver, at first, made to the claim, but I cannot state what the objection was definitely. I think there are letters from the Receiver on that subject; it may be in the memorandum brought by the assistant cashier.

Questioned by Mr. Mitchell:

233 We obtained that note and made the loan in the regular course of business, without any notice of any defects in the note, and we advanced the money on the face of it in the usual course of business.

Defendant's counsel reads in evidence proof of claim produced by the plaintiff, received from the Western National Bank, New York.

Marked Defendant's Exhibit A.

Defendant's counsel offers in evidence letter dated March 28, 1892, from Mr. Pauly to the Western National Bank, of New York.

Marked Defendant's Exhibit B.

234 Questioned by a Juror:

This money was drawn out by the bank. Not by Collins.

HENRY C. HOPKINS, sworn and examined as a witness for plaintiff.

In 1891 I was and still am cashier of the United States National Bank of New York. On the 12th of October, 1891, our bank had a transaction with the California National Bank of San Diego.

Q. What was the transaction?

Objected to on the same grounds previously stated. Objection overruled. Exception by defendant. 235

A. We rediscounted for the California National Bank two of their bills discounted and placed the proceeds of the same to the credit of the California National Bank. The amount of the proceeds was $7,995.27. The proceeds passed to their credit was $7,995.27. That is, the proceeds of the two bills rediscounted. On the next day there was a subsequent transaction.

Q. Please state what that transaction was?

Same objection, ruling and exception.

A. On October 13th we discounted the note of the California National Bank and placed the proceeds to the credit of the California National Bank, namely, $17,316.25. The collateral to that note was six of their bills discounted, aggregating $32,000 and odd. The two together made $24,000 and odd. 236

Questioned by the Court:

The face of the obligations was I think a little more than $24,500. I made it about $25,180.

Questioned by Mr. Mitchell:

The amount of the credit was checked out in the regular course of business. This paper is the note of $17,500 which we discounted on October 13th. In both instances credit was given by our bank to the California National Bank of San Diego, and not to J. W. Collins. 237

Plaintiff's counsel offers in evidence note referred to, dated October 13, 1891, for $17,500, signed California National Bank, per J. W. Collins, president.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit 17.

238 Questioned by the Court:

The $17,500 note was made by the bank; the other notes were bills discounted of the customers of the California National Bank and rediscounted with us.

Questioned by a Juror:

I cannot tell from memory whether they were paid or not. The $17,500 note of the bank had as collateral six notes aggregating $32,160.50. I cannot tell from memorandum how many of those were paid. We still have a claim against the bank —a little over $2,000. I misstate that. We hold
239 Receiver's proof of claim of between $4,000 and $5,000, on which we have received dividends of, I think, 75 per cent., all of the rest were paid out of the collateral which we held. The first note was rediscounted; we held the bank on their endorsement; no collateral note.

Questioned by the Court:

Those are the only transactions in the way of loans that we had with the California National Bank of San Diego at about that time. Our bank never made any loans at any time to J. W. Collins individually.

240 Plaintiff reads from the deposition of

S. N. Wood, taken at Denver, Col.:

My name is Samuel N. Wood; I live in Denver, am fifty years of age, and am not in any business at present. I was acquainted with Mr. Collins during his lifetime, and to the best of my knowledge I may have known him twelve or fifteen years. I cannot give a more definite reply than that. He was, during the latter part of his life, president of the California National Bank of San Diego, California. I knew him in Cheyenne a good many years before he went to California. For about ten years, ending

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in 1891, I was cashier of the First National Bank of Denver. In the month of June, I think—I have no data to go by—I loaned Mr. Collins $25,000. The transaction, however, was an individual one on my part. Had nothing to do with the First National Bank of Denver. 241

Plaintiff's counsel offers in evidence certificate 6479, for $7,500, dated May 23, 1891, to the order of J. W. Collins.

Objected to as incompetent, immaterial and irrelevant; that it is not specified in the bill of particulars of proof of claim; that it antedates the bond, and that it is not identified as the certificate of which this witness is speaking. Objection overruled. Exception by defendant. 242

Marked Plaintiff's Exhibit 18.

Also certificate 6480, for $7,500, dated May 23, 1891, to the order of J. W. Collins. Same objection, ruling and exception.

Marked Plaintiff's Exhibit 19.

Also certificate 6481 for $10,000, dated May 23, 1891, to the order of J. W. Collins. Same objection, ruling and exception.

Marked Plaintiff's Exhibit 20.

To the best of my knowledge there were three certificates, two of $7,500 and one of $10,000, although I may be mistaken as to the amount of each. I know the aggregate amount was about $25,000. I have not got them in my possession. 243

Q. Please state in full what conversation you had, if any, with Mr. Collins in regard to said certificates, and what application he made of the money raised upon them, if you know?

Defendant's counsel objects on the ground that Mr. Collins' statements in that conversation are not evidence against the defendant. Objection overruled. Exception by defendant.

A. At the time I made the loan to Mr. Collins he said that his bank was anxious to buy a certain

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244 corner in San Diego on which they intended to build eventually. That was the explanation he made to me for having these certificates of deposit with him for using them in the manner in which he did. At his request I gave him a draft on Chicago for $25,000 drawn by the First National Bank of Denver. I do not now recollect the name of the bank in Chicago on which the draft was drawn, but I am very positive that is the manner in which I paid it. I think it was the Chicago National Bank. I would state that of my own knowledge I have no information as to what he did with this draft. At that time we kept an account with the Commercial National Bank of Chicago, and the draft may have been
245 upon it. Mr. Collins made no statement to me other than that which I have stated. I have since learned from the First National Bank of Denver, by the exhibition on their part to me, of the original draft, that he took it to the Denver National Bank. I do not know what disposition was made of said draft by the Denver National Bank. The loan was made at the request of Mr. Collins to him individually, he giving his individual note for the loan with these certificates of deposit which I secured as collateral. I am unable to state of my own knowledge whether Mr. Collins applied the money so loaned to the purpose for which he represented to me it was borrowed.

246 Defendant's counsel moves to strike out all the above deposition on the ground that it was an individual transaction and the loan made to him individually.

Motion denied. Exception by defendant.

Plaintiff's counsel reads from the deposition of J. C. Mitchell, taken at Denver, Colorado.

My name is John C. Mitchell. I am thirty-four years of age and reside at Denver, Colorado. I am cashier of the Denver National Bank and have been such since March, 1891, I think. My impression is that I met John W. Collins for the first

time on the 12th day of June, 1891. He then 247
occupied the position of president of the California National Bank of San Diego, California. John W. Collins owed our bank something like $5,000 and interest and on the 12th day of June, 1891, he came into the bank with a draft drawn by the First National Bank of Denver, payable to his order, for $25,000. He requested me to pay his individual indebtedness out of the draft and place the balance to the credit of the California National Bank of San Diego, which I did. This draft was drawn on the Commercial Bank of Chicago. A portion of it was used to pay the individual indebtedness of Collins and the balance was placed to the credit of the California National Bank of San Diego. The 248
amount used to pay the individual indebtedness of Mr. Collins was $5,116.65. I deducted the amount of the credit to the California National Bank of San Diego and it made that difference. This indebtedness of Mr. Collins was his individual debt. Neither J. W. Collins or any of the officers of the California National Bank of San Diego at that time, or at any time in the history of the Denver National Bank, had any account on the books of that bank. There was no conversation at that time relative to the ownership of the draft. Mr. Collins simply presented the draft to me, requested me to pay his personal indebtedness and place the balance to the credit of the California National Bank of San Diego. 249

CROSS EXAMINATION:

The $20,000 draft, which I have stated was placed to the credit of the California Bank of San Diego, was subsequently by our bank paid out for the California National Bank of San Diego; the amount was remitted to the Hanover National Bank of New York for the credit of the California National Bank of San Diego.

Plaintiff's counsel reads from the deposition of C. J. White, taken at Kansas City, Mo.

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250 DIRECT-EXAMINATION:

In 1890 I was cashier of the National Bank of Commerce of Kansas City and had been such for about thirty years, and am still such. The president is W. S. Woods. I could not say exactly how long he has been president, but I think about twelve years. Day before yesterday he was in New York City; I presume he is still there. I don't know. On the 15th day of December, 1890, there was a note given to us for $25,000, payable on demand, for the credit of the California National Bank of San Diego. $25,000 was placed to the credit of that bank on December, 15, 1890; the note was paid on March 5, 1891. I do not recollect now how it was
251 paid. It is true that on December 15, 1890, the California National Bank received credit in our bank to the extent of $25,000, and the note was marked paid on our book March 5, 1891. The California National Bank never drew that amount out of our bank.

Q. Please examine the letter which I hand you, dated February 19, 1891, addressed to the National Bank of Commerce, Kansas City, Missouri, and signed by George N. O'Brien, cashier, and state if it was received by the National Bank of Commerce of Kansas City? A. It was.

Plaintiff's counsel puts in evidence a deposit
252 tag dated April 21, 1891, for $20,000, by National Bank of Commerce, Kansas City.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit 21.

Plaintiff's counsel offers in evidence letter dated February 10, 1891, addressed to National Bank of Commerce, Kansas City, and signed by G. N. O'Brien.

Objected to on the ground that it purports to be signed by G. N. O'Brien, and dated February 10, 1891; that it is dated prior to the date of the

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bond; and that the defendants are not bound by 253
any statement of George N. O'Brien. Objection overruled. Exception by defendant.

Marked Plaintiff's Exhibit 22.

Q. Mr. White, I will get you to state why it was that that $25,000 credit to which you have just referred was not mentioned in the statement which you sent to the California National Bank in January —the first of January, 1891.

Objected to by defendant's counsel on the ground that it refers to a different item and on the grounds previously stated. Same ruling and exception.

254

A. Why that was not put in that statement, because it was on a special account. That $25,000 was not to go to the general account. Q. What do you mean by special account? A. Special account —that it was to be placed there and not checked out. This transaction was an agreement between Mr. Collins—I think he was the man. The contract was made with Woods. I think Mr. Collins was the man that was here. I am not sure. He said he represented the bank and was president of the bank. He represented the bank as president. The National Bank of Commerce had a transaction with the California National Bank on the 16th of April, 1891. They borrowed $20,000, payable on demand, and it 255
was to go to special account, the same as the other. I do not know of my own knowledge whether a check for $20,000 was in the possession of the bank at the time that credit was given to the California National Bank. The amount was not drawn against until it was paid.

Q. Will you please state whether a draft of the California National Bank would have been honored by this bank? A. It would not.

CROSS-EXAMINATION:

The $25,000 note was given by Collins and Dare.

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256 REDIRECT:

Q From your knowledge of banking and customs of banking would you have been able to determine from the entry made by the bank alone, would you have been able to state from the entry alone that those special deposits were not to be drawn against by the California National Bank? A. Yes, sir; it was so stated there, in the entries that was given there it was so stated.

WILLIAM D. BLOODGOOD, sworn and examined as a witness for plaintiff:

DIRECT-EXAMINATION by Mr. Paige:

257 I reside in New York City. I have had ten years' experience in bookkeeping.

Paper produced by plaintiff's counsel shown witness and is marked for identification N. N.

That paper headed "Explanation Sheet," is in my handwriting. I was employed by Mr. Pauly, the plaintiff in this action, to examine the books and papers of the California National Bank with a view to ascertaining the transactions of Mr. Collins with that bank. I was associated in such examination with Mr. A. A. Sparks, of San Diego. We began the examination, I think, about the 1st of April, 1892, and completed it somewhere about the end of May. We worked all the time constantly and
258 worked hard. The paper marked "Explanation Sheet," now shown me, is in my handwriting.

Q. When did you discover the transactions of the 22d of September, 1891; the 13th and 14th of October, 1891, and the 31st of October, 1891, which are detailed in that paper?

Objected to as incompetent, immaterial and irrelevant; that it is of no consequence when Mr. Bloodgood discovered this, and that it calls for his conclusion as to what constitutes a discovery. Objection overruled. Exception by defendant.

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A. I discovered these items that you mentioned towards the end of May. At that time we discovered others. We discovered that credits to Collins' account were on the bank's guarantee and endorsement of the bank, and that the deposit tag was made up by George N. O'Brien, the cashier, as far as I can remember. 259

Questioned by the Court:

I made this paper (Exhibit NN for identification) some time in May, 1892, as the result of my investigations.

Questioned by Mr. Paige:

This paper was made as soon as possible after the discovery of the facts. I can state without this paper if it is needed. I gave the paper to Mr. Pauly, the Receiver, and in that way communicated to him the facts in regard to the things that occurred on these four days as stated in that paper. In that way I communicated to him my discovery of those facts. In the latter part of May; it must have been prior to the 23d of May on account of this date. I cannot say that Mr. Pauly then wrote to the defendant a letter, of which this is a copy. I know that he notified them at once after I gave him this statement. 260

Plaintiff's counsel offers in evidence the paper headed "Explanation Sheet." 261

Objected to as incompetent, immaterial and irrelevant, and not evidence against the defendant. Objection overruled. Exception by defendant.

Marked Plaintiff's Exhibit 23.

Questioned by the Court:

I know that he so notified the defendant, because I was connected with him. I did not write the letter. I heard him dictate it. This paper is a copy of the letter.

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262 Letter dated May 23, 1892, written by Mr. Pauly to defendant, marked Plaintiff's Exhibit 24.

I continued preparing and perfecting the details of those transactions and the attending transactions of Mr. Collins. On the 28th of May I prepared this paper now shown me, which is a sort of proof of claim.

Marked for identification CC.

Q. Was that sent by Mr. Pauly to the defendant by mail on the 28th of May?

Mr. Strong:

263 Q. Do you know of your own knowledge? A. I can't answer that from my own knowledge; no, sir.

Plaintiff's counsel reads a letter dated May 31, from plaintiff to defendant.

Marked Plaintiff's Exhibit 25.

Also enclosure marked Plaintiff's Exhibit 26.

Also letter dated May 31st from defendant to plaintiff, marked Plaintiff's Exhibit 27. Also letter dated June 24th from plaintiff to defendant, marked Plaintiff's Exhibit 28. Also letter dated July 8th from defendant to plaintiff, marked Plaintiff's Exhibit 29.

264 Also letter dated July 18th from plaintiff to defendant, marked Plaintiff's Exhibit 30.

Mr. Paige: I have here the statement, and after the preliminary proof has been made I will offer it. I now call upon the defendant to produce it as a foundation for that offer.

Mr. Willcox: I haven't got it.

Plaintiff's counsel also offers letter dated July 26th from defendant to plaintiff, marked Plaintiff's Exhibit 31.

Also letter dated August 1st, from plaintiff to defendant, marked Plaintiff's Exhibit 32.

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Also letter dated August 8th, from defendant to plaintiff, marked Exhibit 33. 265

Also letter dated September 6th, from plaintiff to defendant, marked Plaintiff's Exhibit 34.

Also letter dated September 14th, from defendant to plaintiff, marked Plaintiff's Exhibit 35.

Also letter dated September 31st, from plaintiff to defendant, marked Plaintiff's Exhibit 36.

Also letter dated September 28th, from defendant to plaintiff, marked Plaintiff's Exhibit 37.

Also letter dated October 4th, from plaintiff to defendant, marked Plaintiff's Exhibit 38. 266

Examination of witness continued: We did not delay any time that I know of waiting for Bradbury Williams in regard to investigating the books. Mr. Pauly, the Receiver, took possession of the banking house and its contents on the 29th of December, 1891. I remember a demand made by Mr. O'Brien upon Mr. Pauly for his salary.

Q. And what did Mr. Pauly respond?

Objected to on the ground that the O'Brien business has nothing to do with this case. Objection overruled. Exception by defendant.

A. He said he did not see his way clear to pay it on account of O'Brien owing the bank. 267

Q. Did he say he was going to charge it up? A. He said he would have to endorse it on his indebtedness or note, or something of that kind. I think O'Brien left that day or the next. As near as I can remember, that was about the first of March, 1892. As a result of the investigations to which I have testified, the expert and myself made up the amount of the indebtedness of Mr. Collins to the California National Bank as of a particular day—as of several days. There were two transactions on the 13th and 14th of October, if I understand you

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268 right. There appears on the books to the credit of Mr. Collins, an item of $20,000, also an item of $24,500, and another one of $500. This money was placed to the credit of Collins' personal account. The deposit slips in my hand show the same thing—that John W. Collins was credited $24,500.

Questioned by the Court:

There is one deposit slip of October 13th which purports to be a deposit or draft, or something else, of the United States National Bank of New York, for $24,500, which is in the handwriting of the cashier. The deposit slip for $20,000 is in the same package. That is also in the handwriting of the
269 cashier, O'Brien. The deposit slip for the $500 is right here and is in the handwriting of George N. O'Brien, cashier of the bank.

Questioned by Mr. Strong:

I have had banking experience. I have been teller of the Merchant's National Bank of San Diego, since this transaction. I have kept the books of this same bank since this transaction.

Questioned by the Court:

Neither of these items purports to represent a deposit of money.

270

Questioned by Mr. Paige:

Assuming that the deposit had been made in the United States Bank upon its books to the credit of the California National Bank, the proper entries to have been made upon the books of the California National Bank by Mr. O'Brien to represent that transaction correctly would be—if the money was obtained upon bank collateral—the proper entries should have been to have credited the money to bills payable on the books of the California National Bank and debited the United States National Bank of New York. There are no such entries upon the

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books of the California National Bank; only a charge 271
to the United States National Bank and a credit to Mr. Collins, individually; whereas, if it was on a note of the bank, the appropriate way to represent it would have been to charge the United States National Bank and credit bills payable. If it was on the discounts of the bank, it should have been credited to rediscount and not to J. W. Collins. The other item there is a deposit tag for $20,000, which should have been placed to the credit of bills payable and charged to the Western National Bank. The actual entries are a charge to the Western National Bank of $20,000, and a credit to the account of Collins of $20,000; bills payable is not credited with $20,000. 272

By Mr. Paige:

Q. Here is a $500 slip, what is that?

Objected to. Objection sustained.

Mr. Paige: There are several pages of these. I simply offer the telegram. There is no need of taking up the time of the Court.

Mr. Strong: I object to them.

The Court: Why don't you produce those original telegrams, they were sent to New York?

Mr. Paige: The telegrams were in cypher; we haven't got the originals here.

The Court: You can get them from the telegraph 273
company, can't you?

Mr. Paige: We will try. This paper is a deposit tag of the California National Bank, dated April 21, 1891; it is in the handwriting of George N. O'Brien. The books show in regard to the transaction that the National Bank of Kansas City is charged $20,000, and J. W. Collins' personal account credited $20,000. This paper came from the letter book of the California National Bank, and is dated April 11, 1891. It was written by George N. O'Brien, cashier, to W. S. Wood, President of the National Bank of Commerce of Kansas

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274 City. There is no other entry in regard to that transaction on the books of the California National Bank. There is no entry upon the items of bills payable. There were no subsequent entries made in regard to the transactions in the account of the Kansas City Bank. I believe it stands to this day upon the books of the California National as a debit to the Kansas City Bank. I could tell by looking at the book. I find that when the bank closed the entry had not been corrected, had not been charged back, had not been credited to the National Bank of Commerce. I cannot say whether it was ever drawn against by the California National Bank. The books show a number of entries from the time
275 that first charge was made. The books show all the time a balance in favor of the California National Bank on the books of the Kansas City Bank of a little short of $26,000; $86.86 short.

Q. I show you the check of J. W. Collins for $19,500, already in evidence, which the witness Brimhall testified he found among the cash items. Will you look at the teller's book of November 11th. How much cash does that show as carried by the teller? A. $86,198.50, consisting, according to this book, of $45,200 bank bills in the vault; $981 bank bills; $20,000 gold; $9,480 gold; $10.75 fractional currency; $942.52 silver coin; $96 nickels and pennies; $25 ten cents, nickels and pennies; $5,937.30
276 checks and other cash items; $2,461.60 Mexican dollars.

Q. As to the actual cash items that I found, all I can say is what represented the cash; that was what was turned over by the National Bank Examiner; the papers that he turned over to us.

Mr. Mitchell states that, acting on the suggestion of the Court, the plaintiff and he applied to the Western Union Telegraph Company to obtain, if possible, the original telegrams, and was informed by the vice-president of the Western Union Telegraph Company, the president being absent, that they did not retain original telegrams more than six

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months after their date, and it was impossible therefore to obtain the original telegrams. 277

CROSS-EXAMINATION:

Q. Do the books of the bank show that that $10,000 credit of the First National Bank of Chicago was obtained by Mr. Collins? A. The deposit check shows. I did not learn from my examination of the books of the bank that that $10,000 credit to the First National Bank of Chicago was a result of a discount by that bank of Mr. Collins, of a private note of Mr. Collins for that amount, a note made by Mr. Beard of Cheyenne. I know that the San Diego bank drew on the second of November against that money drafts aggregating $10,000, and these were 278 presented and paid.

Questioned by the Court:

The San Diego National Bank overdrew the account of the First National of Chicago by the First National paying that $10,000. The San Diego bank got the money.

Questioned by Mr. Willcox:

I first entered the employ of Mr. Pauly on the 8th of January, 1892, and continued in his employ until about the 10th of April, 1893. I was in San Diego when the National Bank examiner took charge of 279 the bank. Mr. Collins and Mr. O'Brien both lived there then. Right away, upon entering into the employ of Mr. Pauly, I commenced work for him; that was in January, 1892. I did not commence work on the books of the bank in that month. I looked after his affairs and helped making up the report to the Comptroller of the Currency; that necessitated his going over all the assets and placing the value of the same and making up the report; that is about all. There was a statement given to Mr. Pauly by the National Bank Examiner showing accounts that ought to be made to correct the books,

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280 and in giving his report to the Comptroller, and stating over-certificates of deposit, &c., and over-issues of stock; he simply checked that up; checked that up in the books. That report to the Comptroller, made by the Bank Examiner, which preceded Mr. Pauly's coming into possession, was not copied in the books of the bank. I do not know that we had a copy of it. He gave a detailed copy; not in a book, it was on loose sheets. I believe that was retained. I don't think I have seen it since the first time when Mr. Pauly was making up his report. We then went over it together, in the month of January, 1892. Concerning these transactions which have been put in
281 evidence here, there was a statement to make correcting entries, not necessarily in the account of Mr. Collins. Mr. Chamberlain, the National Bank examiner, said: "I don't know whether it is Dare and Collins, or Collins. You will have to go through that thing and find out." Those items were not discussed between Mr. Pauly and myself, while his report was being made up, only in a general way. He told me to take that list and check up and see whether it corresponded. We didn't know anything about it.

Mr. Willcox: Now I should like to read what those items were, so that we shall know what the witness meant when he said the items were dis-
282 cussed.

Q. But they relate to these transactions? A. Yes, sir.

Q. But they related to these transactions?

Q. To this $7,500 certificate?

Q. To the $20,000 item of the Western National Bank of New York?

Q. To the $25,000 item of the United States National Bank of New York?

Q. To the $10,000 item of the First National Bank of Chicago?

Q. And to the other $10,000 of the Western National Bank of New York?

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The Witness: Those items were not discussed between Mr. Pauly and myself, except in a general way, he telling me to take that list and check it up to see whether it corresponded. 283

Q. It was discussed in a general way, you say? A. We didn't know anything about it.

Questioned by the Court:

As far as I can remember, he simply asked me to take the statement that the National Bank examiner said to make correcting entries, to correct the books and check up these certificates of deposit, and see what the stubs of the certificate of deposit book showed; to look in the other books and see if the money went through—that they were paid. I simply did it in that way, not knowing anything about it, but simply checked it up to see if it corresponded with the National Bank examiner's table, so that Mr. Pauly could get it in his report. Some of the items, other than certificates of deposit, were just in the same way. I had no way of going through the books to find out of my own knowledge at that time. I simply took that statement, and found that these items claimed in this statement—some of them—were credited to Collins, but I cannot remember the whole statement now. 284

Questioned by Mr. Willcox:

As to the item of $25,000 United States National Bank, I checked up the United States National with the Western National Bank account in the report made by Mr. Pauly, with the account of the bank. I want to say why I answered in that way. I was thinking of the checking up of the accounts of the United States National Bank. That I checked up afterwards, to show how their balance tallied with ours. That is what I thought you were asking me. I took that statement, if I can remember, and looked over the account of Collins to see whether any of 285

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286 these amounts were credited to his account. That is all the checking I did as far as that statement goes. I did not check them with the accounts of the bank on that statement. I did on the statement rendered by the United States National Bank in checking that up. I checked up the items contained in that report with Mr. Collins' account to find out whether these had been placed to his credit, and I did that before that report was sent to the Comptroller by Mr. Pauly, and I found out that Collins had been credited with those items. That was in the month of January, 1892. I checked up Collins' account to find out if he had been credited with those items, because the National Bank Examiner
287 made this statement to correct the books, and on this statement he said, "Charge Collins and credit United States National Bank," and I took that statement to see whether those amounts had been placed to the credit of Collins. There was no suspicion in my mind that these ought to have been charged to Mr. Collins. I did not know anything about it at that time. Nothing at all was said about it between Mr. Pauly and myself; simply to check it up. I did not know anything about it when I went in the bank. Mr. Chamberlain did not say anything to me. I could not get anything out of Mr. Chamberlain. He told me to make those entries, to correct the books, and I have some of the
288 papers where he first started himself.

Questioned by the Court:

O'Brien was retained in the service of the Receiver until about the first of March.

Questioned by Mr. Paige:

Q Now, up to that time had there been any discussion, of which you are aware, between the Receiver and any of the bank officials about any dishonesty on the part of the cashier, O'Brien?

Objected to as immaterial and irrelevant. Objection overruled. Defendant excepts.

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The Court: They would not suppose he was guilty 289
of these frauds. There is no use of going back to that time. I suppose it was known that there had been irregularities and perhaps frauds in the management of the bank, but it was not supposed that the cashier knew anything about it until long after the time he was discharged.

The Witness: Yes.

Questioned by Mr. Willcox:

I was familiar with a great deal of what Mr. Pauly did in the performance of his duties as Receiver while I was there. I knew of the receipt by Mr. Pauly of proofs of claim as they came in. I acknowledged a majority of them. I remember one 290
coming in from the Western National Bank.

Q. (By the Court.) I wish you would state, so we can put it in evidence, when it was that you first suspected that the cashier had been guilty of dishonesty or fraud. I am not asking when you first verified it, but when you first suspected it.

Mr. Willcox: We object to that as immaterial and irrelevant.

The Court: I have allowed some evidence of this character already; it is clearly competent and in the case of the bond given in behalf of O'Brien, but whether it is competent in this suit on a bond given in behalf of the president I am not entirely clear. It seems to me it is safer to omit it.

Mr. Paige: If your Honor has any doubt about it, 291
I will omit it.

The Court: If you desire to omit the evidence then the other which was admitted a little while ago as to the discovery of the fraud had better be stricken out.

Mr. Willcox: Do I understand that is on the application of the plaintiff.

The Court: I sustain your objection and I instruct the jury to disregard the evidence. It is on the suggestion of the Court. I have some doubts that the evidence is competent, and I do not think it desir-

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292 able to have any question raised as to its competency. Of course, the issue in the other case was as to the discovery of specific acts on the part of O'Brien. Here the issue is as to the discovery of acts of dishonesty on the part of the president. I think on that issue it is doubtful whether any evidence at the time of the discovery of such acts by O'Brien is admissible.

I discovered that these entries had been made by reason of deposit tags in January when I checked up the account of Mr. Collins, but I did not know that they were a fraud on the part of the cashier. I knew he had made the entries, but I knew nothing about them. I saw the slips them-
293 selves. I had the slips in my possession in January, 1892, when I checked up the accounts. I checked up those according to that statement of the National Bank Examiner. There is nothing in the statement as to deposit tags.

By the Court:

Q. Do you mean to say that you had seen and examined the deposit slip which referred to these transactions of October 13th and 14th, and October 31st in January? A. No, I took that statement and checked his account from that statement.

Questioned by Mr. Willcox:

294 I was examined under oath on the first trial of the action upon the O'Brien bond and I was then sworn to tell the truth. As near as I can recollect I commenced the examination of Mr. Collins' account in the neighborhood of the first of April to go through the entire account. As far as I can recollect I first commenced the examination of the books of the bank about the first of April. That is my best recollection. The time has gone so that it is almost impossible to remember it. My memory is not any better now than it was on the first trial of the action on the O'Brien bond in that suit. On the first trial of that action I was sworn to tell the truth.

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Q. I read on page 4: "When did you commence 295
the examination of the books of the plaintiff bank? A. Some time in February."

Q. Was that true? A. It depends upon what kind of an examination it was.

Q. You were then sworn to tell the truth as you have been here now. Do you recollect that question? A. No, sir; I do not.

Q. I show you the record. Does that refresh your memory any? A. It might, but as I say, I have been occupied by other business for the last two years and it is hard work for me.

By the Court:

Q. What do you think about it now? Was it the 296
first of February or the first of April? A. In February I might have gone through and checked up—I remember checking up a certificate of deposit account to compare it with that statement.

By Mr. Willcox:

Q. I will read you another question: "Q. But you did become engaged in the examination of the books and were engaged by Mr. Pauly to examine the books and aid in the examination of the books? A. To aid in the examination of the books." Do you recollect that question and that answer? A. I don't recollect it, but I take it it is all right.

Q. Have you any doubt but what it is all right? 297
A. No, sir; I have not.

Q. Would seeing your testimony refresh your memory? A. No.

Q. "Q. How long were you in the employment, in assisting the expert? A. I was about four months." Do you recollect that? A. No, I do not. It must be so, though.

Q. Who was the expert that was with you? A. Mr. A. A. Sparks; he resided in San Diego; I last saw him there when I was engaged in this work of examining the books. Mr. O'Brien was in San

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298 Diego. Mr. Collins was not there all the time. When I first went with the Receiver he was there. In commencing the checking up part he was there. What I would convey is this, that it was on the account of J. W. Collins and not on the general examination of the books of the bank. Mr. Collins did not help me when I was examining the books. Mr. O'Brien was in looking over the general books of the bank. Mr. Collins was in San Diego all the time I was looking over the general books of the bank, but not at the time I was looking over his personal account. As far as the examination of the general books of the bank went, Mr. Collins was there all the time. All the
299 examination that was made was checking up that statement. He died on March 3, 1892. When I just testified that those slips were before me when I made that examination, I was misled. I may have said so, but I did not understand the question right. I claim to be a thorough bookkeeper—a practical bookkeeper. If you mean an expert, I don't do that for a living. I claim to be a practical bookkeeper, nothing more. If Mr. Collins procured the United States National Bank of New York to credit the California National Bank on its books with $25,000, by reason of a discount of Mr. Collins' personal note, I would, as a bookkeeper, credit to Mr. Collins, of course, on the books of the California National
300 Bank. That is apparently just what O'Brien did. I would make the same answer to a similar question put to me relative to the Western National Bank on a personal note, and to the First National Bank of Chicago. I was examined as a witness in San Diego, in 1893, on behalf of Mr. Pauly in an action wherein the Equitable Life Insurance Company of New York City was defendant, before Mr. A. H. Sweet, United States Commissioner, and on that occasion I was sworn to tell the truth and did tell the truth.

Q. I read you this question: "Q. Go right on with Collins' account and state the condition of it so far

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as you know? A. Well, as I said before, the second 301
of May J. W. Collins was given a credit for $40,000 by a deposit tag made up for that amount. Q. What other item was there? A. On the 25th of March, $20,000." Do you recollect those questions and answers? A. Yes, sir.

Q. "Q. What year was that? A. 1891. That was obtained from the Third National Bank of Chicago; the amount being obtained on a note of Dare, Collins and Havermale." Do you recollect that? A. Not as to the Third National; no, sir.

Q. "Q. Did you discover any other irregularities of Mr. Collins? A. No, sir." Was that true? A. On that day does it mean?

Q. It does not fix the date. It covers the entire 302
account of Mr. Collins? A. I don't remember that; no, sir. Doesn't it state any further—anything about it in my deposition—because I remember going into it more in detail than that? I do not recollect testifying that there were no further irregularities. My testimony given at that time was supposed to be true, but I do not see how I could make any such answer as that when I know different.

(Original deposition shown witness.) That is all right; I acknowledge the deposition.

Q. And now I show you that part of it where you so testified, and I ask you to read, at lines 14 and 15? A. Hadn't we been through any more of those items 303
prior to that?

Q. Apparently not? A. I don't understand it myself.

Q. Have you any explanation to make of it? A. No, sir. There must be an error in some way because I could not possibly make any such answer as that, I know. When I then testified I had before me an abstract of the account of J. W. Collins, exactly as I always had, those same entries, and I do not see how any answer could have gotten down in that way, because I had them all before me. I did then testify concerning the payment by Mr. Collins of

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304 large sums of money, but I think not for the benefit of the bank.

By Mr. Willcox:

I will read you a question:

Q. "Q. State if you can whether Mr. Collins paid out any of these moneys for the use of the bank? A. Yes, sir." Do you remember that question? A. No, sir.

Q. Just take the testimony and turn to page 204 and you can follow me, lines 11 and 12. Do you find that question and that answer contained in the original testimony by you then given? A. Yes, sir.

305 Q. "Q. State how much and in what particular cases? A. On the 10th of November, 1891, they paid $20,000." Do you find that question and answer? A. Yes, sir.

Q. "Q. Whom did that go to? A. They took up that note of bills payable, $20,000." Do you find that question and answer? A. Yes, sir.

Q. "Q. Who held the bills? A. I think it was the National Park Bank, a $20,000 note; on the 9th of November he charged him with $11,250." Do you find that? A. Yes, sir.

Q. "Q. How much? A. $11,250. This settled the indebtedness due the Hanover National Bank of New York." A. Do you want me to explain why

306 those were made?

Q. I want to know whether you find that question and answer? A. Yes, sir.

Q. "Q. Due from this bank to the Hanover Bank? A. Yes, sir. Q. What else do you find? A. Also on October 30th, $11,000 paid to National Park Bank. Q. Do you find anything else? A. October 23d, paid the Bank of California, $20,000." Do you find those questions and answers? A. Yes, sir.

Q. "Q. What was that on the liabilities of this bank? A. Yes, sir." Do you find that question and answer? A. Yes, sir.

Q. "Q. Is there anything else? A. October 16th,

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Pacific Bank, $5,000; October 12th, $5,000, Pacific 307
Bank; Sept. 20th, Pacific Bank, $5,000; Sept. 2d, National Bank of the Republic, New York, $4,000; July 11th, Union National Bank, $20,000." Do you find those questions and answers? A. Yes, sir.

I know that it is quite customary in banks to carry checks as cash. If the paper of the California National Bank had been rediscounted for Mr. Collins, the proper place to credit it would be rediscounts. There is an account of rediscounts in the books of the California National Bank. I find three entries therein made by the bookkeeper of the bank and two by me. There were three entries made during the lifetime of the bank; three credits and three debits. The 308
date of the first credit is July 8, 1890, and the date of the last one is August 7, 1890. The date of the first debit is September 22, 1890, and of the last debit December 10, 1890. I find the account in these books of bills payable. I find during the lifetime of the bank one credit in that account and no debits. There is a credit here of $20,000, made by Henry O'Brien to the National Park Bank. There is only one entry to the $20,000 to the National Park Bank. That account was not debited during the life of the bank with the $20,000 that was paid, as I testified, to the Park Bank by Mr. Collins. During my investigation it appeared to me from the books that there were some bills rediscounted by the California Na- 309
tional Bank, but not many. Those that I speak of, those few of the United States National Bank, went to the credit of J. W. Collins. All of the bills rediscounted by the California National Bank, of which I have any knowledge, appear from the books to have been entered in Collins' account. All of the class of items known as bills payable appear in Mr. Collins' account except this one. The teller's cash book shows all checks and deposits paid out and received on certain dates, all drafts on different banks, and all bank debits and credits. It shows also certificates of deposit. If a party comes in to make a deposit

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310 and take out a certificate of deposit, we would credit that to certificate of deposit account. The cash would appear in the teller's book; the certificate would not; only the memorandum and number of the certificate would appear there. It would appear what the cash was for and where it came from. There was an account in the books of certificates of deposit.

REDIRECT-EXAMINATION by Mr. Paige:

The examination made by me in January and February, to which my attention has been called, was simply on that statement given by the National
311 Bank Examiner to correct the books. It did not extend to any more than the general books of the bank, not to the investigation of any particular account. So far as verifying the list of certificates of deposit went, it just extended to checking up those certificates that the statement of the National Bank Examiner called for, to be charged back to Collins, and to see whether the list he had made agreed with the stub book of the bank—agreed as to the outstanding certificates. I cannot tell whether Exhibit A is the account or a copy of it which is contained in the letter of July 18th unless I see it. I made up a copy exactly like that, to be sent to the American Surety Company, but as to the exact date I cannot say. (Handing witness paper.)
312 I can identify it as the one described in this letter of July 18th.

Questioned by Mr. Strong:

I said a moment ago that I did not remember the exact date when I made it up. When I made it up I gave it to Mr. Pauly, and I never saw it again. As to what became of it, I only know what he said when I gave it to him: to be sent to the American Surety Company. What he told me about it, is all I know—after I once put it into his possession.

Mr. Paige: On July 26th defendants write: "Yes-

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terday afternoon we received your communication 313
of the 18th instant and its enclosures." Now, the enclosure is described in the letter of July 18th as follows: "I beg herewith to send you a statement of account with J. W. Collins, showing the amount of deficiency to be $374,978.22." This paper shows such a deficiency.

Questioned by the Court:

The receiver wrote the letter of July 18th. I know it was mailed, but I don't know when. That is, I made it up and gave it to Mr. Pauly to be sent to the Surety Company, and he told me, time and again, it was mailed, but as to the exact date I cannot say.

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Examination of Mr. William Bloodgood suspended.

Mr. PAULY called and examined for plaintiff:

Questioned by Mr. Paige:

I recognize the paper given me as the paper, or a copy of the paper, which is described in this letter of July 18th to the defendant.

The Court:

Q. Do you know whether you enclosed it in your letter of July 18th, or a paper of which this is a copy? A. I don't remember that I did. I can't 315
remember the specific act, but I am satisfied that I did.

WILLIAM D. BLOODGOOD recalled for plaintiff:

Questioned by Mr. Paige:

We never had any account of Mr. Collins made up showing that balance. I never made up, under Mr. Pauly's direction, any other account showing that balance for the American Surety Company. Mr. Pauly never had one while I was with him.

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316 FREDERICK N. PAULY recalled:

Questioned by Mr. Strong:

I do not remember the specific act of putting this report in that letter. I don't remember the paper being brought to me at about that time. I remember that that statement was made up and that I sent a copy purporting to be that statement to the American Surety Company in a letter. I do not remember the specific act of putting it in the letter. I remember that I mailed such a letter; that I had such a letter written and had it sent to the American Surety Company, and that is all. I did not mail it.

317 Statement offered in evidence by plaintiff. Objected to on the ground that it is not sufficiently shown to have been sent to defendant, or a copy of it; and upon the further ground that it could not be evidence against defendant, it not being a transcript from the books solely, but being the conclusions of Mr. Pauly and his experts from outside inquiries.

The Court: Mr. Paige, have you given formal notice to defendant to produce the statement?

Mr. Strong: We do not make any point about that. I merely state that we have produced everything we can find, and we do not find any statement at all.

318 Objection overruled, and defendant excepts. Marked Plaintiff's Exhibit 39.

Questioned by Mr. Paige:

As to this $20,000 item charged on bills payable account, in regard to which I have testified on cross-examination, I will have to make a little explanation. I cannot very well explain about this unless I explain how the transaction occurred. It was on that note of the National Park Bank that J. W. Collins took credit for previously, and he charged his account and credited bills payable, put it where it ought to belong, and there it still stood; that is

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all there is to it. Then the National Park Bank 319
proved their claim for $20,000 note. It was charged to Collins' account. He had previously taken credit for that amount. He charged the National Park Bank and credited J. W. Collins, and then he charged him $20,000, and got it out of his account, and credited bills payable of the general ledger, and that made it right. That is, this $20,000 bills payable that you ask me about, where Mr. Collins' account was charged $20,000.

The Court: What does that relate to?

Mr. Willcox: That relates to a $20,000 item which it is charged that Mr. Collins got credit for. That related to the deposit tag of June 13, 1891.

The Court: There is an item of June 6, 1891, 320
National Park Bank, of which there was a deposit slip and a credit given to Mr. Collins of $20,000

Mr. Strong: That is one item that I have a memorandum of to strike out, and I will make that motion now.

The Court: Let us understand what the evidence is about.

Mr. Paige: There was a credit entry made in this case which made it all right.

The Court: So that really he was entitled to a credit of $20,000.

Mr. Paige: No, sir; but they corrected the transaction afterwards by charging it back against him.

Mr. Strong: So that really that sum should not be 321
deducted from his account.

Mr. Paige: That is so.

Mr. Strong: Now, I move to strike out all the evidence about that item of June 6, 1891, for $20,000.

The Court: Yes, that is out of the case entirely.

Mr. Paige: There is further testimony given by Mr. Bloodgood about that paper.

The Court: I do not see why it is important to spend much time in this case over the other items in the account claimed to have been improperly

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322 credited to Collins aside from those items of October 13th and 14th. This bond was for $25,000. When the bank failed November 11th the entire balance due Collins was $11,000.

Mr. Paige: There was a check of $19,500 to be charged up against that.

CROSS-EXAMINATION by Mr. Willcox:

I recognize Plaintiff's Exhibit 39 now handed me. That looks like the paper which has been by the plaintiff put in evidence on the theory that it is a copy of the paper that was mailed to the American Surety Company about July 18, 1892.

It looks like the paper I had here yesterday; if
323 that is the one that is in evidence. The other statement was made by me; the one that was sent to the defendant. I mean the one I assume has been sent to the defendant. This document is supposed to be a copy of the one which I assume was sent to the defendant. No, this is the original one—the one sent to the defendant is a copy. The copy was sent. I wrote the copy. It was supposed to be an exact copy so far as I know. I did not make this up. I called off the items to Mr. Sparks and he wrote it. This is in the handwriting of Mr. Sparks. I got the data that was used to make up this account from the books—all from the books. I used books and information both. Information from facts, let-
324 ters, letters from different banks, general facts in the bank, investigations by us and submitted to the United States Attorney and by him examined to determine whether they should be put in this account as illegal credits, whether they should be thrown out. Everything is in that account, all the debits and all legal credits—illegal credits were thrown out. When I say the illegal credits were thrown out, I mean all credits were thrown out which were said to be illegal by the United States Attorney, so that the United States Attorney, Mr. Pauly, Mr. Sparks and I undertook to determine whether these credits were

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legal or illegal in making up this account. We al- 325
ways gave Mr. Collins the benefit of the doubt if it was even on a credit. This was done under Mr. Pauly's instructions. I was acting under Mr. Pauly. The question whether we should debit or credit Mr. Collins' account was passed on by Mr. Pauly as to these credits. It appears in this account that we charged Collins with the $10,000 item which has been assumed was connected with the Western National Bank of New York of October 31, 1891. We did not credit Mr. Collins' account with the item correcting that entry which I have already testified was made in the ledger on the 9th of November, 1891, so that, in that account, it would now seem that we charged Mr. Collins with that 326
$10,000, although the books of the bank show that at the time we made up that account Mr. Collins was entitled to the benefit of the correcting entry.

Questioned by Mr. Paige:

We put that item of $10,000, which the books show was not correct, in there, because the United States District Attorney said that when Mr. Collins charged his account he had no funds there and it was an attempt to correct an entry; that his previous credits were all illegal and thrown out, and his account was largely overdrawn when he charged that $10,000, and he had no money there, 327
and he said we could only throw out illegal credits. That attorney is Mr. M. T. Allen. The tag relative to that credit shows a telegram—a dispatch.

By Mr. Paige:

Q. From what source did that credit come?

Mr. Strong: He has given that already, all that the tag shows.

A. The tag shows a telegram—a dispatch.

When (handing witness paper) I first saw this

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328 telegram it was in the private drawer of Mr. Collins in the bank files. They had a file for filing letters and telegrams, and they had one file, a case, under the personal name of J. W. Collins, and these telegrams were all found; at least I found them there, and I picked them out of the drawer.

Questioned by the Court:

That comprised telegrams from Collins to the bank or any personal letters from him signed by him. I do not remember the exact period of time over which it extended. I believe it was from the first of January, 1891. That file was kept right there in
329 the bank—right alongside of the vault; it is one of these letter files; they were arranged alphabetically, and each one has a drawer. All letters under "A" are filed in one drawer by itself, and under B, and they also had them for each bank; letters from the United States National Bank in one drawer, and also J. W. Collins. When I say it was in Mr. Collins' drawer I mean it was in the bank drawer assigned to correspondence from Mr. Collins; supposed to be his private letters.

Questioned by Mr. Paige:

That telegram was in cipher. I can only read it as it has been translated here. The cipher has not
330 been communicated to me. I cannot read it at the present time; I had the cipher there at the bank. I only know how to read that cipher from looking at it up from this telegram. It corresponded at that time with the translation. I have not got that translation. There is one word here that I cannot remember. I can remember the rest. I believe it is all translated on those telegrams. I believe it is in O'Brien's writing over some of these cipher words.

Telegrams, three in number, offered in evidence by plaintiff.

Objected to as incompetent, irrelevant and immaterial; that there is no legal or sufficient

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evidence as to their meaning; that they are not 331
shown ever to have been sent by Collins, and they are not shown to be telegrams which were even in the bank at the time the entries now in Court were made; that the witness has not sufficient knowledge to enable him to speak of the cipher; that all his knowledge is mere hearsay, and there is no declaration from anyone from whom he got the information which could be evidence against this defendant, and inasmuch as Mr. Collins is dead, it is impossible to learn anything about these telegrams.

The Court: I think there is enough to authorize the admission of the telegrams. You may read the telegrams as they are in cipher. I will consider 332
whether the translations are competent afterwards.

Objection overruled. Defendant excepts.

Marked Plaintiff's Exhibits 40, 41 and 42 respectively.

EXAMINATION of WILLIAM D. BLOODGOOD continued:

Questioned by the Court:

I have spoken in my testimony of a cipher that I found in the bank's books. It was in a small book giving certain words, and the explanation of what those words meant. It was found in a drawer in the desk in the bank with other ciphers. They had 333
ciphers between the different banks here in New York, and this is the personal cipher between Collins and the bank. I know this was the particular code that was used between Collins and the bank, because it was given to me by Mr. O'Brien, and he said it was, and also other persons in the bank. I remember comparing some of the messages in the bank with the cipher code, but I cannot remember about these.

The Court: I will sustain the objection and exclude the cipher translations.

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334 FERDINAND W. LAFRENTZ, sworn and examined as a witness for the defendant.

DIRECT EXAMINATION:

I am an expert accountant, and am now with the American Surety Company. I have been with them permanently since, I think, March or April 1st of this year; previous to that I was an expert accountant and had been such for fourteen years. My residence was then Ogden, Utah. I went to this bank after it passed into the possession of Mr. Pauly as Receiver. In January, 1893, and again in August, 1894. I was at the office of Mr. Pauly examining the books and papers. Mr. Pauly pro
335 duced all the books and papers for which I called.

Plaintiff's counsel offers in evidence tag of March 25, 1891.

Objected to. Objection overruled. Defendant excepts.

Marked Plaintiff's Exhibit 43.

Plaintiff's counsel reads in evidence certificate of authorization of the California National Bank to commence business, dated December 29, 1887.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit 44.

Plaintiff's counsel reads in evidence certificate of organization of the California National Bank
336 dated December 16, 1887.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit 45.

Plaintiff's counsel reads in evidence appointment of Frederick N. Pauly as Receiver, dated December 18, 1891.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit 46.

Plaintiff's counsel reads in evidence copy of Receiver's bond, dated November 29, 1891.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit 47.

[PLAINTIFF RESTS.]

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Defendant moves to strike out the testimony in 337
regard to the deposit slip of May 2, 1891, said to be in the handwriting of Harry E. O'Brien, and which professes to relate to Brunell & Co., of Chicago, two items of $20,000 each, on the ground that it appears from the teller's book that that sum on that day was deposited.

Motion denied. Defendant excepts.

Defendant also moves to strike out the evidence in regard to the check of J. W. Collins of $20,000, July 20, 1891, to the order of C. D. 6633, as that certificate is not shown to have been negotiated or used under circumstances making it a claim against that bank, nor has it been allowed by the Receiver nor 338
has anything ever been paid upon it; and also to strike out the evidence in regard to check for $15,000, dated September 16, 1891, to the order of C. D. 6780, upon the same grounds.

Motion granted.

Defendant also moves to strike out the evidence in regard to the note of J. W. Collins, dated August 22, 1891, payable six months after date, for $51,038.35, on the ground that the note did not fall due until long after October 13th and 14th, and there was no explanation of the note or of the transaction, and that there is no ground upon which it can be used against the defendant upon the issues in this case.
339

Motion denied. Defendant excepts.

Defendant makes similar motion on the same grounds in regard to the note of September 15th for $6,659.

Same ruling and exception.

Defendant makes a similar motion in regard to the credits of October 13th and 14th, $20,000 and $25,000, on the ground that they are an entire departure from the proof of claim.

Motion denied. Defendant excepts.

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340 Defendant moves for a non-suit on the following grounds:

1. That the complaint does not state facts sufficient to constitute a cause of action.

2. The preliminary notice was not served as soon as practicable after discovery of acts which might involve loss.

3. Neither the notice or proof of claim was served as soon as practicable after actual discovery of loss, nor within six months after expiration or cancellation of the bond.

341 4. The loss has not been shown to have been discovered during the continuance of the bond, nor within six months thereafter, nor within six months from the dismissal or retirement of the employee from the service of the employer.

5. No loss has been shown which was set forth in the proof of claim, and the proof of claim cannot be enlarged or varied by the bill of particulars.

6. The alleged false credits of October 13th and 14th, 1891, have not been shown to be false, or without consideration, nor to have been procured by Collins, nor has any loss been shown to have oc-
342 curred by reason of them.

7. The supposed loss, for which plaintiff claims to recover, depends upon the deduction of alleged false credits, given, if at all, prior to the existence of the bond in suit, and such a loss, if made out, would not be within the terms of the bond.

8. No fraud or dishonesty on the part of Collins has been proved, and nothing beyond the mere overdraft or indebtedness on his part. No act of his is in evidence, which comes within defendant's undertaking. It has not even been shown that Collins

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knew of these alleged false credits of October 13 343
and 14, 1891, on which plaintiff seeks to recover.

9. It appears affirmatively that Collins' name and his account were used for carrying on bank transactions, and this with the acquiescence and even actual knowledge of the directors, and from time to time he was accustomed to make and did make payments for the benefit of the bank from this account kept in his individual name. With that fact in evidence it is not enough for plaintiff to show merely that there are enough debits in the account to exhaust the credits. He must go further and show, not only that the debits represented actual payments, but that these moneys were drawn by 344
Collins and applied for his personal benefit.

10. It does not appear that the bank required the giving of the bond. Collins had already been the duly elected and installed president for some time, and it does not appear that he would have been removed but for the giving of the bond.

11. The alleged loss, for which plaintiff seeks to recover, occurred, if at all, through the negligence and misconduct of the directors of the bank, and for such a loss the Surety Company is not responsible.

Motion denied. Defendant excepts.

345

Defendant also moves to strike out the item of $20,000, of March 25, 1891, the Union National Bank, because it is shown by the testimony of Mr. Bloodgood that on July 11, 1891, the account of Collins was charged with $20,000 for the Union National Bank. Motion denied. Defendant excepts.

Mr. Strong opens the case for defendants.

It is admitted that the officers of the American Surety Company, being called, testify that the application of Mr. George N. O'Brien, made for the bond, and J. W. Collins, made for bond,

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346 were received and acted upon together, and that the bond in this action sued upon was issued in reliance upon the truth of the statements contained in such applications and the certificate thereon endorsed.

Defendant's counsel offers in evidence the applications referred to, of Mr. O'Brien and Mr. Collins. Marked Defendant's Exhibits C and D.

Defendant's counsel reads from the deposition of Theodore R. Gay, a witness examined on behalf of the plaintiff, taken at San Diego, California.

From the DIRECT-EXAMINATION:

347 My name is Theodore B. Gay; I am 59 years of age; my occupation is real estate, and my residence San Diego, California. I was a stockholder and director of the California National Bank during 1891.

From the CROSS EXAMINATION:

I had known Mr. Collins in November, 1891, for nearly three years, and I had known Mr. O'Brien at that time for about two years. I was one of the original directors of the California National Bank. Its first cashier was J. W. Collins and its first president William Collier. I think Mr. Collins was
348 cashier until January, 1891--perhaps January, 1890. I do not recollect now which. He was cashier until he was elected president. Mr. George O'Brien's first position was teller. He attended to the collection department. He remained in that capacity until he was elected cashier. He was elected cashier at the time Collins was elected president. During my acquaintance with Mr. Collins I had business transactions with him. They were neither very voluminous or many. During the course of my acquaintance with him I observed his business methods, and I had occasion to talk with people as to his character and his financial standing here in San Diego.

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Q. From what you learned in the course of your 349
business conversation with Mr. Collins and from your discussions with other people concerning him, what would you say was Mr. Collins' reputation for financial standing in San Diego up to the 11th day of November, 1891?

Objected to as immaterial. Objection sustained. Defendant excepts.

Q. Is it not a fact that Mr. Collins was generally reputed to be a man of large means?

Same objection, ruling and exception.

When I signed notes at the request of Mr. Collins I didn't have much idea how they were to be used. 350
I must acknowledge I made no inquiry, and the best of my recollection now is I supposed they were to be used for the purposes of the bank in some way —to get money for the bank in some way. I guess the amount of one note was $25,000; that is, my name was on that with others, and I didn't have any personal obligation out, I think. The one for $25,000 was brought to my office, and I signed there because the other names were on, and made no question. Mr. Havermale's name was on it. This is one, as I have learned since, for I had forgotten all about the note until it was issued on—I had forgotten why I had ever signed it, to tell the truth about it. I think Collins' name was on—Havermale, Collins and myself—all the directors of the 351
bank. There was no other note that I know anything about. There was a certificate of deposit that my name was on the back of; that was $15,000, and then reduced to $5,000. I think that certificate was to the order of J. W. Collins. While Mr. Collins was cashier of the bank he practically managed its affairs. Neither Mr. Collins or Mr. O'Brien ever consulted me concerning the issuance of certificates of deposit. I was not consulted during the year 1891 by either Mr. O'Brien or Mr. Collins relative to entering any credit upon the books of the bank in favor

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352 of Mr. Collins of any sort. It was not usual for Mr. Collins or Mr. O'Brien or any of the other employees of the bank to consult the directors as a board or individually concerning the making of entries in the accounts of depositors.

Plaintiff admits that he collected $20,448 17 on certain life insurance policies of John W. Collins.

Examination of WILLIAM D. BLOODGOOD continued.

Questioned by Mr. Willcox:

353 This paper is the deposit slip that relates to the item concerning which some testimony has been given here—$40,000, May 2, 1891. That slip is in the handwriting of Henry O'Brien, the general bookkeeper of the California National Bank. The credit arising therefrom is supposed to have arisen on some sort of paper, or otherwise. This slip is a deposit slip of the California National Bank, dated May 3, 1891, "credit of J. W. Collins, Brunell & Co., Chicago, two items of $20,000 each, aggregating $40,000." I find an entry in the teller's cash on that day under "deposits," of $40,000.

"Mr. Willcox: This is one of the items which if I understand the plaintiff's contention, should be de-
354 ducted from Mr. Collins' account.

"The Court: You asked him about the teller's cash.

"Mr. Willcox: That is it; in the teller's cash—deposits made that day, $40,000.

"The Witness: This is not in the cash; it is in the general credits. The book shows that apparently $40,000 was deposited on that day that is one of the items which was deducted from Mr. Collins' account in the making up of this account. In other words, we deducted from Mr. Collins' account $40,000 even though the teller's cash showed that it had been received. There was nothing in the statement rendered

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the American Surety Company that I recall, that 355
showed that deduction from Mr. Collins' account or why that deduction had been made; but I think in a previous statement, or a statement of some kind, the defendant had a statement of these large amounts which we charged them with. It is attached to one of the affidavits here; the affidavit of Mr. Pauly verified June 24th before me at San Diego, is the only statement that I know of showing defendants had notice of that amount. I do not know of any paper that was sent to the American Surety Company telling them of the deductions that we had made from Mr. Collins' account.

Questioned by the Court: 356

This $40,000 composed of the two items of May 2, 1891, were disallowed Mr. Collins in our accounts on the theory that they were illegal. The best explanation that I can give of reason is that the teller's book showed that the bank bills in the vault were increased that day $40,000; the previous day it was $19,500. This day it was increased to $59,500, and with the letter "I" alongside of it, denoting that it was an item. The information was given me direct in the bank that those were cash items and stood for items.

Questioned by Mr. Mitchell:

By cash items, I mean simply a memorandum, no 357
real cash transaction, simply paper which is called cash. Brunell & Co. were, I understand, a hardware concern, if I remember correctly, with which Mr. Collins was connected. I do not know whether it was then in existence. I do not know anything about it.

Questioned by a Juror:

The other deposit slips on that day would account for all of the cash received. I have never gone over to find out whether if the other deposit slips were

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358 checked back, it would account for all the cash received that day. This $40,000 has never been charged back to Mr. Collins. It stands now to his credit. The teller must have used it as cash, and carried that $40,000 as cash. It never did get out of the cash except $25,000 of the $40,000 that went out of that account on the 18th of May, 1891, and the slip of $15,000 was counted in the teller's cash as cash.

The Court: How did the $25,000 item go out?

Mr. Willcox: I object. The witness could not know this. He is clearly testifying to something he can have no knowledge of.

359 Objection overruled. Defendant excepts.

The Witness: It was charged to the First National Bank of Chicago. That reduced the item.

Q. It went out then merely by bookkeeping? A. That is all.

Mr. Willcox: The witness could not tell. He was not in the bank himself.

The Court. He gives his opinion from what the books, the slips and the letters indicate.

Mr. Willcox: I move to strike out the testimony by this witness concerning his opinion as to how this item got into the account or how it came to get out of it, on the ground that they are clearly conclusions of the witness.

360 Motion denied. Defendant excepts.

Defendant's counsel reads in evidence list of property assigned by W. J. Collins to the California National Bank, with the estimation of the value thereof, enclosed in Mr. Pauly's letter to the American Surety Company of July 18, 1892.

Marked Defendant's Exhibit E.

Defendant's counsel reads from the report sent by the plaintiff to the Comptroller of the Currency, January 27, 1892, two items on page 280, which are as follows:

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"Certificate of Deposit 6800, Sept. 22, 1891, J. W. Collins, 7,500"—with a cross against it. 361

"Certificate of Deposit 6801, Sept. 22, 1891, J. W. Collins, 8,500"—with a cross against it.

From page 282: "Less C. D's"—meaning certificates of deposit—"not appearing on general balance indicated in above list by a cross."

From page 344, under heading "Bills Payable."

"AT WESTERN NATIONAL BANK, NEW YORK CITY.

"Note of California National Bank $20,000.

Due Jan. 15/92, guaranteed by Collins and Havermale, and further secured by W. O. Havermale, B. D	$10,000 00
Jamul Portland Cement Company	5,000 00
William Coles, B. D	2,250 00
L. B. Howard, B. D	12,500 00
J. W. Marsten, B. D	1,000 00
D. D. Dare	5,500 00

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"AT UNITED STATES NAT'L BANK, NEW YORK CITY.

Note California Nat'l Bank	17,500 00
Due Dec. 15/91, secured by Wm. Collier, B. D	4,449 65
Silver Gate Mfg. Co. B. D	8,488 40
Bear Valley Irrigation Co	5,266 00
Do Do	Do.
A. B. Norman, B. D	3,500 00
G. W. Marsten, B. D	2,500 00
Bear Valley Irrigation District	5,672 45
C. C. Seaman	7,500 00."

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Those are the two bills payable to the Western National Bank and the United States National Bank, with a statement of the collateral held by the banks. "B. D." means bills discounted.

Mr. Paige: We now offer in evidence the whole report, inasmuch as the defense have offered part of it.

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364 Mr. Strong: We object to any part of it, except such as tends to explain the part we have read.

The Court: I will allow the whole report to go in. You cannot split up a document in that way.

Defendant excepts.

Defendant reads in evidence from plaintiff's original bill of particulars verified by the plaintiff, paragraph 6, as follows:

" The following is the date of the dismissal or retirement of said John W. Collins and of the discovery of the acts of fraud or dishonesty referred to as alleged in the 9th paragraph of said complaint.

365 " 'The said J. W Collins ceased to act as president of the said California National Bank upon the same going into insolvency and coming into the possession of the Comptroller of the Currency of the United States, which took place December 12, 1891; that on the 29th day of December, 1891, Frederick N. Pauly, the plaintiff herein, qualified as the receiver of said bank, and took full possession of its assets under his trust, and that the acts of fraud and dishonesty referred to in paragraph 9 of said complaint were discovered during the months of February and March, 1892.'

Dated July 21, 1893.

366 MITCHELL & MITCHELL,
Attorneys for Plaintiffs,
45 & 47 Wall Street,
N. Y. City.

" UNITED STATES STATES OF AMERICA,
State of California,
District of California, } ss.:

FREDERICK N. PAULY, being duly sworn, says: That he is the plaintiff in the above entitled action; that he believes the foregoing is a true and correct

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bill of particulars of the demand for which this action is brought. 367

(Sgd.) FREDERICK N. PAULY

Sworn to before me this
21st day of July, 1893.
(Sgd.) F. P. BRUNER,
Notary Public, in and for
San Diego Co.,
Cal."

[DEFENDANT RESTS.]

Defendant renews the motion to dismiss the complaint, on the grounds heretofore stated, and on the further ground that the bond in suit was obtained by the concealment and misrepresentation of material facts, and for that reason cannot be enforced. 368

Motion denied. Defendant excepts.

Mr. Strong addresses the jury on behalf of defendant.

Mr. Mitchell addresses the jury on behalf of plaintiff.

Defendant's counsel presents the following requests to charge:

DEFENDANT'S REQUESTS TO CHARGE. 369

1st. There can be no recovery in this action upon or by reason of Certificate of Deposit No. 6800 for the sum of $7,500.

2d. There can be no recovery in this action upon or by reason of Certificate of Deposit No. 6801, for $8,500.

3d. There can be no recovery in this action for or by reason of the loan of $25,000 from the United States National Bank of New York, on or about the 13th or 14th day of October, 1891, nor for or by

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370 reason of any credit alleged to have been given by reason of such loan.

4th. There can be no recovery in this action for or by reason of the loan of $20,000 from the Western National Bank on or about the 13th or 14th day of October, 1891, nor for or by reason of any credit alleged to have been given by reason of such loan.

5th. There can be no recovery in this action for or by reason of the credit of $10,000 on the 31st day of October, 1891, which was afterwards charged back to the account of Collins before the failure of the
371 bank.

6th. There can be no recovery in this action for or by reason of the other credit of $10,000 on the 31st day of October, 1891, claimed by plaintiff to be connected in some way with a transaction with the First National Bank of Chicago.

7th. There can be no recovery in this action for or by reason of any of the bank assets mentioned in the bill of particulars, as having been used by Collins as collateral either with the United States National Bank or the Western National Bank.

372 8th. If the jury find upon the evidence that the plaintiff did not, as soon as it came to his knowledge that Collins had been guilty of an act or acts which might involve a loss to be claimed of the Surety Company under the bond, notifying said company as soon as practicable, after obtaining such knowledge, then there can be no recovery in this action. He could not delay giving such notice, until he had actually discovered that such act or acts did involve a loss.

9th. If the jury find upon the evidence that on or before the first day of February, 1892, Mr. Pauly

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knew of any act of Collins which might involve a loss to the Surety Company under the bond in suit, then they must find a verdict for the Surety Company. 373

10th. If the jury find upon the evidence that on or before the first day of March, 1892, Mr. Pauly knew of any act of Collins which might involve a loss to the Surety Company. under the bond in suit, then they must find a verdict for the Surəty Company.

11th. If the jury find upon the evidence that on or before the first day of April, 1892, Mr. Pauly knew of any act of Collins which might involve a loss to the Surety Company under the bond in suit, then they must find a verdict for the Surety Company. 374

12th. If the jury find upon the evidence that on or before the first day of May, 1892, Mr. Pauly knew of any act of Collins which might involve a loss to the Surety Company under the bond in suit, then they must find a verdict for the Surety Co.

13th. If the jury find upon the evidence that the plaintiff did not serve upon the Surety Co. written proof of his claim as soon as practicable after the discovery of any loss occasioned by the acts of Collins, then there can be no recovery in this action, and by serving such proof of claim "as soon as practicable" is meant that the plaintiff must have served it as soon as by the exercise of reasonable diligence he was able to draw up and verify such written proof of claim and transmit it to the Company. 375

14th. If the jury find upon the evidence that on or before the first day of March, 1892, Mr. Pauly knew of any of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company.

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376 15th. If the jury find upon the evidence that on or before the first of April, 1892, Mr. Pauly knew of any of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company.

16th. If the jury find upon the evidence that on or before the first day of May, 1892, Mr. Pauly knew of any of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company.

17th. The defendant in this action is entitled to all the right of any surety. The law looks with
377 favor upon a surety, and does not deem it in the least degree improper upon his part to insist upon a strict compliance with all the terms and conditions of the contract, which were inserted therein for his benefit.

18th. There can be no recovery in this action upon any item of claim made at this trial, unless a claim in regard to such item was set forth in the proof of claim served upon the defendant, nor unless such item of claim has been proved upon this trial as it was set forth in said proof of claim.

19th. If the jury find upon the evidence that Collins gave to the bank his check for $10,000 to apply
378 against one of the credits of $10,000 each of October 31, 1891, and that the bank received and used this check, charging it against him in his account, then there can be no recovery on account of that credit of $10,000.

20th. Before any recovery can be had in this action upon either of the certificates of deposit numbered 6800 and 6801, the plaintiff must show that it was dishonestly or fraudulently obtained by Collins; that it was used for Collins' own personal benefit instead of for the bank, and that the bank has suffered loss thereby.

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21st. There can be no recovery in this action for or by reason of any item here claimed unless the jury find upon the evidence that Collins was guilty of some conduct in respect to that item which can properly be considered dishonest or fraudulent. It would not be enough for the plaintiff to show merely that for some reason or other Collins was not entitled to the money sought to be recovered. 379

22d. It is not enough for plaintiff to show merely that Collins received moneys of the bank and did not repay them. That alone would not establish the allegations of the complaint, and would not justify a verdict against the Surety Company.

380

23d. If the jury are satisfied upon the evidence that nothing has been shown by plaintiff beyond a mere indebtedness of Collins to the bank, then there can be no recovery in this action.

24th. Before a recovery can be had upon any one of the alleged false credits mentioned upon this trial, it must be shown by the plaintiff that such credit was actually a false credit. The credit itself as entered upon the books of the bank, was in itself an admission binding upon the bank and upon this plaintiff, that the bank had received from Collins money or value to the amount of the credit, and this admission must be in some way overthrown by the plaintiff before he can claim to recover for or by reason of that credit. 381

25th. The books and papers of the bank are not of themselves nor are any entries therein, binding upon this defendant, or evidence against it, and the jury must not accept as evidence any entry therein unless established by the testimony of some witness having personal knowledge of the transaction to which the entry relates, and establishing such transaction by means of such knowledge.

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382 26th. Even if the jury find that the credits of $25,000 and $20,000, for which the plaintiff seeks to recover, were fraudulently and dishonestly obtained by Collins, that alone does not make out the plaintiff's claim; he must show that a loss resulted from these credits, and in considering this latter question the jury must not regard the alleged earlier false credits that have been given in evidence. These earlier credits have no legitimate bearing upon this question of loss from the latter ones.

27th. The jury cannot infer fraud or dishonesty upon Collins' part in regard to any item here claimed, upon the theory that Collins was heavily
383 indebted to the bank outside of such item or items. There is no legal or sufficient evidence that Collins was ever so indebted to the bank in any considerable amount.

28th. If the jury come to the conclusion upon the evidence that Collins procured the credits in his account for the purpose of some bank transaction to be carried on his name, then there would be nothing fraudulent or dishonest in them.

29th. In considering the question whether or not any loss for which plaintiff seeks to recover was occasioned by dishonest and fraudulent acts on the part
384 of Collins, or whether it was the result of acts which could not be called either dishonest or fraudulent, the jury are entitled to consider, if there is any doubt about the facts, the previous good character and reputation of Collins, if they shall find that the previous good character and reputation were good.

30th. No act of O'Brien is of itself evidence in this case against the Surety Company or even against Collins, no such act can be considered by the jury to the prejudice of the Surety Company until it is shown that Collins either directed or procured it to be done, or also that he approved and ratified it.

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31st. Nothing that Collins may have done after any act done by O'Brien, can be considered as a ratification of O'Brien's act, unless it appears by the evidence that Collins knew what O'Brien had done. 385

32d. The law presumes in the first instance that Collins was innocent of any fraud or dishonesty, in connection with any transaction, on account of which plaintiff seeks to recover. This presumption will, of itself, be enough to defeat the plaintiff, unless he can in some way overthrow it.

33d. The plaintiff has not overthrown the presumption of innocence and honesty on Collins' part, unless there is evidence in the case that cannot be reconciled with such innocence and honesty. If all the facts in evidence taken together in their proper relation to each other permit the belief that Collins was innocent of any fraud or dishonesty, if they leave room for the inference of an honest intent, the plaintiff has failed to make out his case and cannot recover. 386

34th. On the question of fraud or dishonesty, the burden of proof is on the plaintiff from first to last.

35th. If the jury find upon the evidence that Collins acted for the bank in procuring the bond sued on, and that before procuring this bond he had been guilty of dishonest and fraudulent conduct in connection with his duties as president and that this fact was concealed from the Surety Company, then there can be no recovery in this action. 387

36th. If the jury find that at the time of making application for or receiving the bond in suit any person acti g for the bank represented to the Surety Company that the accounts of the Cashier O'Brien had been examined and had been found to be correct, and that the surety relied upon such representation, when in truth those accounts showed that

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388 prior to that time Collins had been guilty of dishonest and fraudulent conduct in connection with his duties as president of the bank, then there can be no recovery in this action.

37th. If the jury find that at the time of making application for the bond in suit any person acting for the bank falsely and fraudulently and with knowledge to the contrary represented to the Surety Company that the accounts of the cashier O'Brien had been examined and had been found to be correct, when in truth those accounts showed that prior to this time Collins had been guilty of dishonest and fraudulent conduct in connection with his duties as
389 president of the bank, then there can be no recovery in this action.

38th. If the jury find upon the evidence that the bond in suit was procured by concealment or misrepresentation of any facts showing prior dishonest or fraudulent conduct on the part of Collins, then plaintiff cannot recover, no matter who was guilty of such concealment or misrepresentation. The bank cannot now enforce the bond without being affected by the consequence of such concealment or misrepresentations.

39th. If the jury find upon the evidence that a
390 reasonable amount of care exercised in the supervision of the president and cashier of the bank, and in the examination of its books and papers, would have disclosed the fact that Collins had been guilty of dishonest and fraudulent conduct in connection with the performance of his duties as president of the bank, and that the directors or other officers of the bank wrongfully and negligently omitted to exercise such supervision and make such examination, the bank cannot under these circumstances take from the Surety Company a bond to answer for the faithful performance by Collins of the same duties in the future, and hold the Surety Company responsible

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for similar misconduct on his part thereafter and 391
there can be no recovery in this action.

40th. In the event of finding a verdict for the plaintiff, the jury can only find a verdict for such amounts, if any, as the evidence shows that the bank has actually lost through or by reason of the certificates of deposit of the various credits which have been spoken of upon the trial. In the case of the certificates of deposit, the loss would be such amounts, if any, as the bank has been shown to have been compelled to pay prior to the beginning of this action to regain possession thereof.

41st. If the jury find a verdict for the plaintiff 392
they will render a special verdict, stating the items of claim for or on account of which the verdict is rendered and the amount of loss which they find to have been sustained by the bank on account of each of such items.

CHARGE.

WALLACE, *J.*—Gentlemen of the Jury: The plaintiff in this action seeks to recover the amount of a certain bond executed by the defendant to the California National Bank of San Diego, conditioned to indemnify the bank during the term of one year for any loss arising from the fraudulent or dishonest 393
acts of its president, Mr. Collins. That bond contained provisions by which it was incumbent upon the bank, with reasonable promptness, after the discovery of any acts of fraud or dishonesty which might involve the defendant in liability upon the bond to give notice to the defendant. It also contained a provision that within six months after the discovery of the acts of fraud rendering the defendant liable, and as soon as practicable thereafter, the bank, or its proper representative, should make a written claim of loss, giving notice to the defendant of the particulars of its demand.

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394 Now, before the plaintiff can recover in this action you must be satisfied that the bank sustained a loss through the dishonest or fraudulent acts of Mr. Collins, the president, within the terms of the bond, and that it gave the notice of discovery and made the claim of loss pursuant to the terms of the policy.

The bank suspended on the 11th or 12th day of November, 1891. About the 18th of December, 1891, if I remember correctly, the plaintiff was appointed its Receiver by the Comptroller of the Currency, the bank in the meantime having been in charge of the Comptroller through his subordinates. Thereafter investigations were set on foot to ascertain the condition of the bank, and to ascertain the
395 state of the President's account. It may become a question of some importance in this case when that investigation was commenced, when it was completed, and at what time during its course the discovery was made of the transactions in respect to which it is now insisted the defendant is liable on the bond. On the 23d of May, 1892, the Receiver sent a written notice to the defendant of the discovery of acts of frauds and dishonesty on the part of the cashier, and on the 24th of June, 1892, the Receiver mailed to the defendant a written statement of claim, practically proofs of loss, and those were received by the defendant, if I remember right, on the 8th day of July, 1892.

396 In view of the claim of loss made on behalf of the plaintiff, and in view of the evidence in the case, the plaintiff is not entitled to recover upon this bond for any loss arising from the acts of fraud or dishonesty on the part of the president, other than that which arise out of the transactions which have been spoken of during the trial as those of October 13 and 14, 1891. It is insisted by the plaintiff that on those days the president obtained, in two or three items, an improper credit in his account on the books of the bank amounting to about $45,000, and if the defendant is liable at all in this action it is liable only because the bank sustained loss arising

BLEED THROUGH

out of the improper credit obtained by the president 397
on those two days.

Now, there is a provision in the policy to the effect that a written statement of loss, certified by the duly authorized officer or representative of the employer (receiver of the bank in this case) and based upon the accounts of the employer shall be *prima facie* evidence thereof. In view of that condition of the policy, I instruct you that the plaintiff has established a *prima facie* case against the defendant, because he gave the written statement of loss, and subsequently transmitted to the defendant a copy of the account upon which it was based.

Nevertheless, the plaintiff has offered additional 398
evidence. He might have rested his case upon the proof that he had complied with this condition of the policy which I have read to you and insisted then that it was incumbent upon the defendant to show that the bank had not sustained a loss within the terms of the policy. But the plaintiff has seen fit to produce further evidence. I am not going to call your attention to that evidence in any detail, suffice it to say that it tends to prove that on or about the 13th of October the president of the bank procured a discount of certain notes of the bank with the customers' notes belonging to the bank as collateral, to the amount altogether of about $45,000; that about that 399
time he sent telegrams in cipher to the cashier of the bank at San Diego; that about that time the cashier caused a credit to be given in the president's personal account for items amounting to about $45,000; that when the bank failed the apparent balance to the credit of the president in his private account was about $11,000, showing that he had drawn out about $34,000 of the $45,000 which had been placed to his credit on the 13th and 14th of October. It is insisted that this evidence authorizes and requires you to find that the president obtained an improper credit, and by means thereof ap-

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400 propriated more than $25,000 of the funds of the bank.

I shall not allude to the evidence which has been given of other improper credits which it is alleged were given to the president in his personal account with the bank. They are only important as tending to characterize the nature of the transactions of October 13th and 14th, and as tending to show the total loss sustained by the bank through its president. But the question for you to determine is, whether by reason of these improper credits of the 13th and 14th of October the defendant became liable for a loss within the meaning of the terms of the policy. Was that a fraudu-
401 lent or dishonest transaction on the part of the president? If it was not, the plaintiff is not entitled to recover. If it was a mere irregularity on his part, an honest irregularity, or if he was not aware of the fact that these credit items were passed to his account, the plaintiff is not entitled to recover. You must find that when he drew this money out he knew, or had reason to believe, that these items had been credited to his account; and you must find that in drawing out the money on those credits he was actuated by a fraudulent or dishonest mind. If, upon the evidence in this case, you can come to the conclusion that he believed that if the directors of the bank had known of these transactions they
402 would have acquiesced and regarded them as entirely satisfactory, why, then it is your duty to find that he was not actuated by a dishonest motive, and therefore his acts in appropriating this money were not fraudulent and dishonest.

The burden is upon the plaintiff to satisfy you by a fair preponderance of evidence of the truth of this issue. Fraud is not to be legally presumed, and the law presumes that every man acts honestly until the contrary is shown. On the other hand, fraud or dishonesty is a condition of the mind. It is incapable of direct evidence. It must always be found from circumstance. There is no way in which the

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10935

plaintiff could show in what state of mind Mr. Collins was while these transactions were taking place, unless he could produce him as a witness on the stand and elicit the truth. 403

Well, as I have said before, the plaintiff has made a *prima facie* case upon this issue because he has complied with that condition of the policy which prescribes that the written statement of claim shall be *prima facie* evidence of a loss within the terms of the policy. Now, it is for you to say, upon the other evidence in the case, which has been elicited principally upon the cross examination of the plaintiff's witnesses, whether the defendant has overcome that case. If you conclude that the defendant has overcome that presumption, and, upon all the evidence before you, that the transactions in controversy are as consistent with the theory of honesty on the part of the president as of his dishonesty or fraud, then the defendant will be entitled to your verdict. 404

This policy contains a condition, to which I have referred, but I will read it in full as it becomes of some importance in your disposition of the case. It provides that the company shall be notified in writing, at its office, in the City of New York, of any act on the part of an employee which may involve a loss for which the company is responsible hereunder as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer. I confess I am not entirely clear as to what the true meaning of that condition is. I have some doubt if it has any application to the discovery of an act which may involve a loss made after the employee has left the service of the employer; but yet the language is broad, and I shall instruct you that it does cover such a discovery, and therefore that it is incumbent upon the plaintiff to satisfy you by a fair preponderance of evidence that he did notify the company of any act on the part of the employee likely to involve a loss for which the company might become responsible 405

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406 as soon as practicable after the act came to his knowledge. Now, it was not incumbent upon the plaintiff to give notice as soon as practicable after he may have had suspicions of dishonest conduct on the part of the president, but it was his duty when he became satisfied that the president had committed some specific act of fraud or dishonesty which was likely to involve the defendant in loss to give notice in writing. This provision does not require that the notice shall be given immediately, but it requires that it shall be given with reasonable promptness after the discovery, and it is a question of fact for the jury to say upon the evidence, in view of the particular circumstances of the case,
407 whether such a notice has been given with reasonable promptness. The notice in this case was given on the 23d day of May, 1892, and it will become necessary for you to inquire and determine when it was that knowledge came to the plaintiff, when he became chargeable with knowledge that the president had committed some specific act of fraud or dishonesty likely to render the defendant liable upon its bond. In the proofs of loss, which were mailed on the 24th day of July, the plaintiff states explicitly, so that nobody could misunderstand it, that immediately after his appointment the president was thought to be short in his accounts, and believed to have embezzled and
408 misapplied the funds of the bank; but he does not state that at that time any specific acts had come to his knowledge of dishonest or fraudulent conduct on the part of the president. He further states that the nature, extent, amount and circumstances connected with the embezzlement and misapplication of funds have come to his knowledge within the last six months, to wit, since the first day of February, 1892. You recall this statement, as contained in an affidavit verified by him on the 31st day of May, 1892. He does not say that he discovered it six months before; he does not say that the nature, extent, amount and circumstances came to his knowl-

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edge on the first day of February; but doubtless in 409
order to comply with the formalities which he deemed necessary, he saw fit to insert that general statement that they had come to his knowledge within six months and since the first day of February, 1892.

There is further evidence bearing on this issue. The testimony of Mr. Bloodgood, you will recall, which, if I remember it correctly, is to the effect that he entered upon the investigation of the facts in reference to the president's accounts and the misapplication of funds by him about the first of April, and completed that investigation some time in May, and as soon as he completed it, he then informed the plaintiff of the result. Now, I 410
will charge you, as matter of law in this case, that if the plaintiff had made discovery of any specific act which he believed might render the defendant liable for loss prior to the first day of May, 1892, the notice was not given with reasonable promptness; but if a discovery was not made until after that time, then you can say and decide as a question of fact, whether or not it was given with reasonable promptness, having been given on the 23d day of May.

In this connection, there is evidence of some significance to be found in the correspondence on the part of the defendant. Long after the defendant had received this affidavit in which the plaintiff 411
made the statement that soon after his appointment it was thought and believed that Collins had misapplied the funds of the bank, the defendant, through its officers, was writing to the plaintiff in respect to this claim, and throughout that correspondence, in which it was excusing itself for not making a prompter investigation into the merits of the claim, it never once suggested that this notice had not been given with reasonable promptness. Now, I do not say that that is controlling, but it is a circumstance to be taken into consideration by you. You remember that in its letter of September

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412 14th the defendant writes to the plaintiff, promising to investigate, and on September 28th it in effect says that it will be happy to deal with the claim upon the merits when it has sufficient opportunity to investigate.

Then the policy contains another provision, to which I will specifically call your attention. That is, that any claim made in respect to this bond shall be in writing, addressed to the company, as soon as practicable after the discovery of any loss for which the company is responsible hereunder, and within six months after the expiration or cancellation of this bond. That means that after the loss had been definitely ascertained and the facts known showing
413 that the defendant had become actually liable on the bond, the plaintiff should have given notice with reasonable promptness thereafter. I leave it as a question of fact for you to say—this notice having been mailed on the 24th of June and the discovery having been made along, according to the plaintiff's theory, in the latter part of May, or some time in May—whether the written claim of loss was given to the defendant with reasonable promptness. If it was not, then defendant is entitled to avail himself of that condition, and the plaintiff cannot recover upon the policy.

Upon all these issues I shall instruct you that the burden of proof is upon the plaintiff; that is to say,
414 he is bound to satisfy you by a fair preponderance of evidence of the truth of the various issues and propositions of fact which he is required to establish. If you come to the conclusion that the bank sustained a loss by the fraud or dishonesty of its president to the extent of $25,000 or more, originating in improper credits given to the president on the 13th and 14th days of October, 1891, and that the plaintiff gave to the defendant notice of discovery and made his written claim in accordance with the conditions of the policy, then the plaintiff is entitled to recover the full amount of this policy, with interest from the time when by its

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terms the loss became payable, and that, as I recall 415
it, is three months after the reception of proofs of loss. That would be about the 8th of October, 1891.

These observations, I think, cover everything which I deem it necessary to submit for your consideration.

I think the defendant is entitled to one instruction which has been requested, and that is, that if you come to the conclusion upon the evidence that Collins procured the credits in his account for the purpose of some bank transaction to be carried on in his name, then there would be nothing fraudulent or dishonest in it. I acquiesce in that, and I have no doubt you will. 416

I will also charge you in substance as requested by the defendant, that if all the facts in evidence taken together in their proper relation to each other permit the belief that Collins was innocent of any fraud or dishonesty, the plaintiff has failed to make out his case and cannot recover.

It is hardly necessary for me to say to you, gentlemen, that it is very desirable that you should arrive at unanimity in this case, if you can do so honestly and intelligently.

Mr. Strong: I except to such of the requests handed up as your Honor did not charge.

I except to that portion of your Honor's charge in which you stated, in substance, that a *prima facie* 417
case has been established by the plaintiff, and I except to the further charge of your Honor in connection with that, that this raised a presumption which the defendant was bound to overcome.

I except to that portion of your Honor's charge in which you said that Mr. Collins sent telegrams in cipher at about that time.

The Court: Is there any doubt about that?

Mr. Strong: I think there is no sufficient evidence to show it.

The Court: Telegrams were found in the bank purporting to be sent by him.

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418 Mr. Strong. Two or three months afterwards.

I also except to that portion of your Honor's charge in which you stated that the books showed the drawing out of $34,000, on the ground that the books alone are not evidence against the defendant.

The Court: I will say that the jury may find from the evidence that after these items of credit were placed to his account he drew out about $35,000 from his account.

Mr. Strong: We except to that. We also except to what your Honor said in regard to a reasonable time, on the ground that "reasonable time" is not quite equivalent to the phrase "as soon as practicable."

419 Mr. Mitchell: We contend that under the language of the bond the plaintiff was not required to notify the defendant of a mere suspicion, or of an act for which the defendant might be responsible, until after the plaintiff was satisfied that the act was one covered by the requirements of the policy and involving a loss for which, under the terms of the policy, the defendant might be liable.

The Court: You wish to except to what I charged as to the meaning of that condition.

Mr. Mitchell: Yes.

Verdict for plaintiff for $25,000 principal and $3,104.16 interest, making a total of $28,104.16.

420

Defendant's counsel moves to set aside the verdict and for a new trial upon the minutes and the exceptions, and on the ground that the verdict is contrary to law and the evidence. Motion denied. Defendant excepts.

Stay of proceedings for thirty days, and at the expiration of time plaintiff to tax his costs and enter judgment; and a further stay of thirty days upon the judgment, and defendant to make and serve bill of exceptions within that time.

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Exhibit "1."

421

PROOF OF CLAIM.

Being described as:

STATE OF CALIFORNIA, }
County of San Diego, } ss.:

Before the undersigned authority personally came Frederick N. Pauly, who being by me first duly sworn, on oath, says:

That heretofore, on the 18th day of December, A. D. one thousand eight hundred and ninety-one, he was, by the Honorable E. S. Lucey, Comptroller of the Currency of the United States, appointed Re- 422
ceiver of the California National Bank of San Diego, California, a banking corporation organized and existing under the National Bank Act, at said city and State, and has ever since remained and now is the Receiver of said bank.

That immediately after his appointment as such Receiver, being advised that J. W. Collins, the then president of said association, was thought to be short in his accounts, and believed to have embezzled and misapplied funds of said association, having as such Receiver employed an expert accountant to enter upon an examination of the books of said bank, that such investigation of the books of said bank show and affiant avers the truth to be that 423
said J. W. Collins, while President of said California National Bank of San Diego, to wit: on the 23d day of September, 1891, caused and procured to be issued to him a certificate of deposit numbered "6800" certifying that J. W. Collins had on deposit in said California National Bank of San Diego the sum of seventy-five hundred dollars ($7,500); and on the same day caused and procured to be issued to him a certain other certificate of deposit numbered "6801" certifying that said J. W. Collins had on deposit in said California National Bank the sum of eighty-five hundred dollars ($8,500), both of said certificates of deposit

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424 being made payable to the order of said J. W. Collins, when in truth and in fact the said J. W. Collins had no such sum of money on deposit in said bank and said bank was not indebted to him in any sum; but on the contrary, the said J. W. Collins was on the 22d day of September, 1891, largely indebted to said bank; which said certificates of deposit so issued to said J. W. Collins he, the said J. W. Collins, sold and discounted with other banks and parties and obtained thereon the sum of sixteen thousand dollars ($16,000); which said sum of sixteen thousand dollars he, the said J. W. Collins, about said day of September 22, 1891, appropriated to his own use and then and there embezzled
425 the said sum.

That on the 13th day of October he, the said J. W. Collins, obtained from the United States National Bank of New York a loan of twenty-five thousand dollars ($25,000), upon a note of the California National Bank and by rediscounting certain individual notes being of the assets of said bank, and took and applied said sum of twenty-five thousand dollars to his individual use and embezzled said sum.

That on the same day, to wit.: on October 13, 1891, said J. W. Collins, while president of said bank, obtained from the Western National Bank of New York a loan of twenty thousand dollars upon a note of said bank, made payable to himself and
426 collateralized with assets of said bank and then and there, as such president, receiving said sum of twenty thousand dollars, appropriated the same to his individual use and embezzled the same.

That afterwards on the 31st of October, 1891, the said J. W. Collins abstracted of the funds of said California National Bank of San Diego the sum of ten thousand dollars ($10,000) he, the said Collins, then and there being the president of the said California National Bank by then and there causing and procuring the account of said J. W. Collins with said bank to be credited with said sum of ten thousand dollars without depositing any sum in

BLEED THROUGH

said bank or paying said bank any consideration 427
therefor and without then and there being entitled to said credit; and said J. W. Collins afterwards and before the suspension of said bank checked out, used and appropriated to his own use said sum of ten thousand dollars ($10,000) so improperly credited, as aforesaid, and then and there used and appropriated to his own use said sum of ten thousand dollars so abstracted from said bank.

That on the same day, to wit, on the 31st day of October, 1891, said J. W. Collins, as president of said bank, caused and procured his said account with said bank to be credited with the further sum of ten thousand dollars ($10,000) without depositing any sum in said bank or paying said bank any considera- 428
tion therefor and without then and there being entitled to said credit: and said J. W. Collins afterwards and before the suspension of said bank checked out, used and appropriated to his own use said sum of ten thousand dollars ($10,000) so improperly credited as aforesaid, and then and there appropriated to his own use said sum of ten thousand dollars so abstracted from said bank.

Affiant says that no part of either of the above sums so abstracted, embezzled or misapplied by said J. W. Collins was ever repaid or returned to said bank. That the two certificates of deposit hereinbefore first mentioned have been presented to affiant as such receiver for allowance as a claim against said bank, which said allowance has been refused, 429
and a suit is now pending in the Circuit Court of the United States, Ninth Circuit, by the holders of such certificates of deposit to establish the same as a claim against said bank.

That said J. W. Collins is now indebted to said bank for the full amount of the sums heretofore mentioned and as by him appropriated to his own use, in addition to other and greater amounts embezzled, abstracted and misapplied by said J. W. Collins while such president at various other dates and times, but as affiant is informed and believes,

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before the day of July 1, 1891. Affiant further says that the nature, extent, amount and circumstances connected with said embezzlement, misappropriation and misapplication as aforesaid, have come to his knowledge and to the knowledge of said California National Bank of San Diego within the last six months, to wit, since the first day of Feburary, 1892.

That said J. W. Collins, president aforesaid, is not entitled to any credits on account of any payments, disbursements, salary or in any manner whatever.

That said Collins during all the times between July 1 and November 12, 1891, was entitled to credit for salary of one hundred and fifty dollars ($150) per month, but affiant says that said Collins was indebted to said bank for amounts of money appropriated by him before said 1st day of July, 1891, in excess of the amount of said salary.

That the above and foregoing statement as to the wrongful, unlawful and fraudulent acts of said J. W. Collins, as president of said bank, between the first day of July, 1891, and the 12th day of November, 1891, said last date being the date of the suspension of said bank, includes all the money misappropriated, embezzled or misapplied by said Collins, which has come to the knowledge of affiant, and as affiant is now informed and believes, constitutes a true and correct statement of the account between the said bank and said J. W. Collins, its late president.

FREDERICK N. PAULY.

Subscribed and sworn to before me this 24th day of June, A. D. 1892.

W. D. BLOODGOOD,
Notary Public
In and for San Diego County.

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Plaintiff's Exhibit No. 2. 433

Described as being "Deposit slip U. S. National Bank, N. Y.," October 14, 1891.

Deposited with
The California National Bank
of San Diego, Oct. 14, 1891.
By more U. S. Nat.
Credit of J. W. Collins

T/D J W 10/13 500

Plaintiff's Exhibit No. 3. 434

Described as being "Deposit slip U. S. National, N. Y." October 13, 1891.

Deposited with
The California National Bank
of San Diego 10/13 1891.
By T/D J. W. C. 10/12
Credit of J. W. Collins

U. S. Nat. N. Y. 24500

Plaintiff's Exhibit No. 4. 435

Described as being "Deposit slip Western National Bank, N. Y.," Oct. 13, 1891.

Deposited with
The California National Bank
of San Diego 10/13, 1891,
By J. W. C. T/D 12
Credit of J. W. Collins

Westn. Nat. 20000.

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Exhibit 5.

Designated as Teller's Cash Book, May 2nd, 1891.

CALIFORNIA NATIONAL BANK OF SAN DIEGO, MAY 2ND, 1891.

CREDITS.

DEPOSITS.

179 70	103 33
244 94	500 00
228 33	28,999 08
4,034 75	112 50
265 00	114 50
1,209 85	200 00
448 00	50 00
210 75	170 45
1,696 40	608 42
475 00	603 00
2,340 09	
591 77	31,466 28 O. K.
183 32	33 00
	1,676 09
12,017 81	
50 00	184 00
61 60	245 00
2,282 96	380 10
45 00	245 05
265 00	
798 50	935 35
96 05	
523 60	1,069 63
279 30	74 85
74 15	363 27
72 40	
7 56	36,672 62
11 35	201 05
371 19	441 20
166 25	260 00

GENERAL ACCOUNTS.

DRAFTS SOLD—		
Pacific.....	6,308 79	
L. A. Natl..	83 30	
Nevada.....	4,440 49	11,661 48
F. & M.....	907 56	
Natl. Park..	2,544 43	
Natl. Ill	271 91	
CERTIFICATES OF DEPOSIT.....		8,685 80
4818	1030	
5032	450	
4857	150	
NOTES PAID—		
4081	2,189 70	
5018	300 00	9,770 70
4873	225 00	
5042	100 00	
5065	3,100 00	
4965	2,226 00	
Local Sev.....		13 62
DISCOUNT AND INTEREST.....		584 60
Rent Mortgage Co.....		50 00
EXCHANGE—		
Pac. less on 31045 1 45		

DEBITS.

CHECKS.

505 67	837 00	127 90
51 25	62 30	93 40
26 00	538 50	75 45
48 25	26 75	33 90
17 50	49 80	22 30
116 50	74 55	207 88
120 83	5,429 00	
354 25	87 20	119 60
	227 30	69 43
25 75	60 15	22 00
16 90		767 84
1 91	13 91	91 25
14 55	15 45	98 00
150 00	3 70	135 00
591 77	30 70	252 60
371 00	12 85	219 70
111 25	511 00	19 98
33 25	87 80	6 80
19 82	8,068 05	323 78
2,576 45	57 30	2,686 81
162 40	155 00	44 65
86 50	43 31	1,101 75
6 50	168 19	115 45
782 31	283 00	666 64
5,200 00	2,115 00	68 25
61 94	93 30	247 03
25 25	340 58	175 00
248 33	174 90	2,282 11

GENERAL ACCOUNTS.

LOANS—		17,087 45
6421	15	
6378	500	
6408	100	615 00
CERTIFICATES OF DEPOSIT—		
Ice	2 60	
Band Concert.	5 00	7 60
EXPENSE—		
BULLION.....1/2 Sov..	240	
2 Mex..	365	6 05
INTEREST—		
Hadley on Graves note.		100 00
EXCHANGE—		
Less Rem. 31045-6		50
BANK DEBITS—		
Union Natl. Error, 4/22		337 32
Escondido 2261	195	
2301	2 75	
2305	50	

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288 85	1,815 00	" " 31046 1 05		81 00	25 00	2,222 38		2366 49 75	297 50
174 80	250 00	4/30 42 50	45 00	24 80	11,258 20	63 00			
179 80	38 00								
1,795 18				15 50	22,781 83	1,664 00	State,	15474 6 90	
262 86	39,677 87	BULLION—		89 00	287 70	2,220 48		488 1 50	
				46 80	268 80	15 00		486 6 95	15 35
19,784 21									
168 52	40,000 00	Bk, Cal. Int. to 3/27	450 00	9,408 78	43 92	2,944 96			18,468 77
		F. & M., 4/30	182 67	11 70	34 81	12 81			
15 00				108 95	1,323 40	188 25			
691 38		EXPENSE.—Union Trust Co. Mail		113 00	61 25	1,126 70	Pacific from N. Y.		2,500 00
197 39		4/22 sent to Un. Natl.	337 32	753 00	575 00	14 00			
7,650 00		Trust S. F., 4/27	80 46	108 21	1,006 30	250 00	CHECKS		45,578 19
74 00		BANKS CREDITS—							
333 18		First L. A., 4/30	144 32	107 06	340 21	18,109 27			
85 40		Natl. Comm., 4/27	15 00	593 50	47 75	375 00			
		Denver, 4/28	265 00	54 00	96 00	320 00	REMITTANCES		18,512 85
28,999 08		Escondido, 4/30 1092 65	1,157 00	11,258 20	88 00	17 95			82,559 81
		State, 5/1	648 55						
		Cheyenne Natl., 4/27	440 00			26,954 97			
		Counsl, 4/30	81 25		26,954 97				
		Deposits	79,677 87			45,777 19			
			94,279 02			199 00	less		
			13 62						
			194,292 64			45,578 19			
		Less	5 00						

				MEMORANDA.
Balance brought forward	66,128 50	Bank bills in vault	59,500 00	
To-day's receipts	94,292 64	" "	4,520 00	
Amount	160,421 14	Gold in vault		Cash items.
To-day's payments	82,559 81	Gold coin in vault	20,435 00	
Balance	77,861 33	Silver in vault	2,510 00	
	20,065 00	Silver coin out vault		
	97,866 33	" (fractional) in vault	955 00	
33 67		" " out vault	1,002 10	
25 34		Nickels and pennies in vault	61 74	
68 33	97,950 00	" " out vault	50 00	
	97,881 67	Check and other cash items	5,474 56	
	68 33	Mexican dollars, $4,352	3,441 60	
		Total cash	97,950 00	

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PAGES FOUND VERTICALLY

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Exhibit No. 5.

Designated as Teller's Cash, September 22, 1891.

CALIFORNIA NATIONAL BANK OF SAN DIEGO, SEPT. 22, 1891.

CREDITS.

DEPOSITS.	GENERAL ACCOUNTS.	
165 05		
190 60	Drafts sold—Nat. Park	1,589 18
93 00	Union Nat	1,500 00
12,250 00	1,746.66	246 66
349 50	Pacific	8,087 62
6,145 75	Los Angeles	31 02
30 82	Maverick	50 00
63 65	Hanover	7,500 00
305 30		
84 25	Certificates —	
486 05		
193 50	Notes paid—5453 5,000	
186 00	5645 5,000	
194 07	5501 175	
167 20	5510 155	
234 65		10,330 00
507 25		
146 50	Discount & Interest	10 50
680 25		159 25
30 00		
22 591 39	Exchange.—	
76 52		
171 50	Bullion Ex. Mex	8 00
212 81		
554 73	Expense T/D	1 85
37 00		
52 70	National Park 9/11	

DEBITS.

CHECKS.		GENERAL ACCOUNTS.	
52 45	23,496 76		
54 75	62 90	Loans	5,610 00
57 96	26 90		
148 58	189 59	Certificates 6667 100	
129 60	19 66	6757 50	150 00
26 25	36 15		
278 50	28 20	Expense, Newhall Seal 22.50	22 50
18 02	93 81		
249 60	4,186 64	Bullion Mex	1 88
14 95	1,141 15		
22 43	247 90	Interest—	
2,345 40	25 50	More Co. to 988.94	
120 70	152 05	Bk. Cal. 225	1,213 94
43 20	88 74		
77 60	153 95		
18 33	323 32	Exchange.—	
162 50	2,493 48		
705 77	1,662 87	Bank Debits—	
198 04	187 00		
79 60	156 76	Hanover Dep Dunlop	12,250 00
99 45	446 93	Escondido 2487 4.50	
112 90	183 17	2483 55.50	
1,021 00	249 07	2477 7.70	
57 31	270 00	State 15,711	67 70
81 20	124 26		152 57
2,006 50	5,159 26	Pacific from N. Y.	7,500 00
80 43	813 84	Nat. Com. "Chicago"	1,500 00
	25 00	Union Nat.,	

150

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183 50	Bk. Cal. 9/11..... 225		8,262 62	42,044 86	Humbolt, Ia., C. D.....	2,483 00
764 97	Bank credits..... 4	229 00	441 00			
95 20			284 02	264 60	Checks.....	42,810 73
37 00	Nevada 9/16..... 72 15		36 65	200 27		
213 00	9/19..... 41 04	113 19	573 00	165 00	Remittances.....	2,861 93
408 40	First S. F.....9/19	13 04	1,513 97	91 00		
32 54			54 08	42,765 73		65,141 25
25,341 26	Nat. Com.....9/17	1,100 00	192 50	45 00		
482 80	Consol.....9/19	587 10	83 55	42,810 73		
384 09	State.....9/19	1,728 27	54 90			
378 79	Pervis.....9/21	1,420 50	102 55			
5,540 68		2,483 00	136 55			
290 00	Deposits.....	32,691 37	123 55			
40	X More.		30 40			
189 50			50 82			
83 85			6,001 85			
33,483 37		58,449 66	96 50			
		8 00	5,049 25			
			400 00			
			23,496 76			

					MEMORANDA.
Balance brought forward.....		125,874 72	Bank Bills in vault.....	70,700 00	
To-day's receipts.....		58,449 66	" " out "	2,099 00	
Amount.....		184,324 38	Gold in vault.....	20,000 00	Cash items.
To-day's Payments.....		65,141 25	Gold Coin, out vault.....	8,287 50	
			Silver, in vault.....	900 00	
269 67			Silver Coin, out vault.....		
73 43	Account 9/21	119,183 13	Silver Coin (Fractional) in vault.....	1,175 00	
		8 00	Silver Coin (Fractional) out vault.....	1,215 80	
343 10	Balance.....	119,191 13	Nickels & Pennies in vault.....	131 15	
119,460 80			" " " out "	27 10	
119,117 70			Check & other cash items.....	13,238 15	
343 10			Mexican Dollars, $1,680	1,344 00	
			Total Cash.....	119,117 70	

1093

448 **Plaintiff's Exhibit No. 6.**

Described as being "Check J. W. Collins, May 25, 1891, No. $25,000."

SAN DIEGO, CAL., May 25, 1891. No.

THE CALIFORNIA NATIONAL BANK OF SAN DIEGO, CAL.

Pay to the order of C/D 6479-80-81, $25,000/00. Twenty-five thousand dollars.

J. W. COLLINS.

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449 **Plaintiff's Exhibit No. 7.**

Described as being "Check J. W. Collins, July 20, 1891, $20,000."

SAN DIEGO, CAL., July 20, 1891.

THE CALIFORNIA NATIONAL BANK OF SAN DIEGO, CAL.

Pay to the order C/D 6633, $20,000. Twenty thousand dollars.

J. W. COLLINS.

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450 **Plaintiff's Exhibit No. 8.**

Described as being "Check J. W. Collins, September 16, 1891, $15,000."

SAN DIEGO, CAL., Sept. 16, 1891. No.

THE CALIFORNIA NATIONAL BANK OF SAN DIEGO, CAL.

Pay to the order C/D 6780, $15,000. Fifteen thousand dollars.

J. W. COLLINS.

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153

Plaintiff's Exhibit No. 9.

451

Described as being "Note J. W. Collins, August 22, 1891, at 6 mos., $51,038.35."

SAN DIEGO, CALIF., August 22, 1891.

Six months after date I promise to pay to the order of the California National Bank of San Diego, in gold coin of the United States, Fifty-one thousand thirty-eight and thirty-five one hundred Dollars, for value received, with interest at 10 per cent. per annum from date until paid.

Payable at the California National Bank, San Diego, California.

(Signed) J. W. COLLINS. 452

(California National Bank
No. 5755½
Due Feb. 22 Spreckels.
San Diego, Cal.)

Plaintiff's Exhibit No. 10.

Described as being "Note J. W. Collins, September 15, 1891, $6,659.00."

$6,659.00 SAN DIEGO, CALIF., Sept. 15th, 1891.

453

Three months after date, I promise to pay to the order of the California National Bank of San Diego, in gold coin of the United States, Sixty-six hundred and fifty nine Dollars, for value received, with interest at 12 per cent. per annum from maturity until paid.

Payable at the California National Bank, San Diego, California

(Signed) J. W. COLLINS.

(California Natl. Bank
No. 5841
Due Dec. 15th
San Diego, Cal.)

POOR COPY

454 **Plaintiff's Exhibit No. 11.**

Described as being "Deposit slip National Park Bank, New York, March 25, 1891."

Deposited with the
California National Bank
of San Diego. 3-25, 1891.
By
Credit of J. W. Collins.

Let to Nat. Park 25,000

455

Plaintiff's Exhibit No. 12.

Described as being "Deposit slip Brunnell & Co. Chicago, May 2d, 1891."

Deposited with
The California National Bank
of San Diego, May 2nd 1891.
By
Credit of J. W. Collins.

Brunnell & Co. "Chicago"
$20,000
456 20,000
40,000

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Plaintiff's Exhibit No. 13.

457

Described as being "Note D. D. Dare, April 1, 1891, 4 mos. $25,000."

$25,000. SAN DIEGO, CAL., Apl. 1st, 1891.

Four months after date, we jointly and severally promise to pay to the National Park Bank of New York City, N. Y., or order Twenty-five Thousand Dollars, for value received, with interest at six (6) per cent. per annum from maturity.

D. D. DARE. Paid.

Payable at the National Park Bank.

No. New York, Aug. 4.

458

Endorsed:

SAN DIEGO, CAL., April 1, 1891.

For value received, we hereby guarantee the payment of within note at maturity, with interest at six per cent. per annum after due until paid, waiving notice, protest and diligence in collecting, and hereby agree to pay all cost and expenses paid or incurred in collecting this note. 9,214.

California National Bank, San Diego, California
Per G. N. O'BRIEN, Cashier.

459

Plaintiff's Exhibit No. 14.

Described as being "Deposit tag National Park Bank, June 6, 1891."

Deposited with
The California National Bank
of San Diego, 6/6, 1891.

By Teleg. Nat. Park Bk.
Credit J. W. Collins.

Check $20,000

POOR COPY

460

Exhibit No. 15.

Being described as note California National Bank to National Park Bank of N. Y. at 60 days from June 3, 1891.

$20,000.

NEW YORK, 3 June, 1891.

Sixty days after date we promise to pay the National Park Bank of New York, to the order of its cashier, at the banking house of said bank, twenty thousand dollars in funds current, at the New York Clearing House, for value received, having deposited
461 with said bank as collateral security for the payment thereof a promissory note made by J. W. Collins and S. G. Havermale for $25,000, at 90 days from June 3, and endorsed by this Bank, and secured by 30,000 bonds of the San Diego Cable R'way Co., which securities or any part or portion thereof, or any security which may subsequently be lodged with the Bank in lieu of any of the above hereby authorize said Bank or its President or its Cashier to sell without notice at the Board of Brokers or at public or private sale, at the option of said Bank or of its President or of its Cashier, in case of the non-performance of the above promise applying the proceeds to the payment of this note,
462 including interest, applying the surplus, if any, to the payment of any and all other demands due or not due, held by the said Bank against the undersigned, and accounting to for the surplus if any. In case of deficiency promise to pay to said Bank the amount thereof, forthwith after such sale, with legal interest.

And we further agree that in case of depreciation in the market value of the securities herewith pledged or which may hereafter be pledged for this loan, we will make a payment on account, or lodge additional collateral security, so that the market value of the collateral securities pledged shall always

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be at least per cent. more than the amount 463
unpaid of this note, and in default of such payment being made on account, or such additional collateral security being furnished within day after the day on which a call or notice therefore has been left at place of business, thereupon this note shall become due and payable, with full power and authority to said Bank, its President or its Cashier, to sell and dispose of the above named securities, and all such additional securities in the manner and way above provided for, subject to rebate of interest for the unexpired term.

CALIFORNIA NATIONAL BANK OF SAN DIEGO.
Per J. W. COLLINS.

464

Exhibit No. "16."

Being described as Note California National Bank to J. W. Collins, endorsed to Western National Bank of New York, at 90 days from October 12, 1891, $20,000.

$20,000. NEW YORK, Oct. 12, 1891.

Ninety days after date, for value received, we promise to pay to J. W. Collins or order, at the Western National Bank of the City of New York, twenty thousand dollars, with interest at the rate 465
of per cent. per annum, said interest being payable having deposited with said bank as collateral security for payment of this note, reference being had to the endorsement hereon and in accordance with its terms, the following property, viz.: Bills Receivable aggregating $36,250, the market value of which is now $
with the further right to call for additional security, in case there should be a decline in the market value thereof, and on failure to respond according to the tenor of this obligation, said obligation shall be deemed to be due and payable without demand or

POOR COPY

notice, with full power and authority to said bank to sell and assign and deliver the whole of the above mentioned security or any part thereof, or any substitute therefor, or any additions thereto, at any brokers' board or at public or private sale, at the option of said bank or its president, or its cashier, or its or their assigns, on the non-performance of this promise, or the non-payment of any of the liabilities mentioned above at any time or times thereafter, without demand, advertisement or notice; and after deducting all expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales, so to be made, to pay any, either or all of the above mentioned liabilities, as said bank or its president, or its cashier, or its or their assigns shall deem proper, returning the overplus to the undersigned.

CALIFORNIA NATIONAL BANK OF SAN DIEGO,
Per J. W. COLLINS,
President.

(Endorsed)—Pay to the order of the Western National Bank and further agree to the terms and conditions of the collateral obligation entered into by the maker of the within note and waive notice, demand and advertisement and notice of any substitution of securities and for full value received hereby guarantee the performance of the promise entered into by the maker of said note.

Exhibit No. 17.

Being described as Note California National Bank to United States National Bank of New York, at 60 days, $17,500.

$17,500. NEW YORK, October 15, 1891.

Sixty days after date we promise to pay to the United States National Bank or order, at its office in the City of New York, the sum of seventeen thou-

BLEED THROUGH

sand five hundred dollars, for value received, with in- 469
terest, at the rate of per cent. per annum, we having deposited herewith, and pledged as collateral security to the holder hereof, the following property, viz.:

Note of Allen D. Norman, I.,	3,500	due Oct. 31, 1891.
William Collier, I.,	4,499.65 & interest	due Nov. 28, 1891.
Silver Gate Mfg. Co., I.,	8,488.40,	due Dec. 17, 1891.
Geo. W. Marston, I.,	2,500	due Dec. 18, 1891.
Bear Valley Irrigation Co.,	5,672.45 & interest	due Jany. 1, 1892.
C. C. Seaman, I.,	7,500	due " 11, 1892.

with authority to the holder hereof to sell the whole of said property, or any part thereof, or any substi- 470
tute therefor, or any additions thereto, at any broker's board in the city of New York, or at public or private sale in said city or elsewhere, at the option of such holder, on the non-performance of any of the promises herein contained without notice of amount claimed to be due, without demand of payment, without advertisement and without notice of the time and place of sale, each and every of which is hereby expressly waived.

It is agreed that in case of depreciation in the market value of the property hereby pledged (which market value is now $32,160.50) or which may hereafter be pledged for this loan, a payment shall be made on account of this loan upon demand of the 471
holder hereof, so that the said market value shall always be at least per cent. more than the amount unpaid of this note, and that in case of failure to make such payment, this note shall, at the option of the holder hereof, become due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and that the holders may immediately reimburse themselves by sale of the said property or any part thereof. In case the net proceeds arising from any sale hereunder, shall be less than the amount due hereon we promise to

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pay to the holder, forthwith after said sale, the amount of such deficiency with legal interest.

It is further agreed that any excess in the value of said collaterals, or surplus from the sale thereof beyond the amount due hereon, shall be applicable upon any other note or claim held by the holder hereof, against us now due or to become due, or that may be hereafter contracted; and that, if no other claim or note against us is so held, surplus after the payment of this note, shall be returned to us or our assigns.

It is further agreed that upon any sale by virtue hereof, the holder hereof may purchase the whole or any part of said property discharged from any right of redemption, which is hereby expressly released to the holder hereof who shall retain a claim against the maker hereof for any deficiency arising upon such sale.

Due December 15th.

Stamped: November 9th, 1893, paid in full and cancelled, United States National Bank, per Collier & Collier, its attorneys.

Endorsed: Pay to the order of the United States National Bank and further agree to the terms and conditions of the collateral obligation entered into by the maker of the within note and hereby waive notice, demand and advertisement and notice of any substitution or change of securities and for value received hereby guarantee the performance of the promise entered into by the maker of said note.

BLEED THROUGH

Plaintiff's Exhibit No. 18.

475

Described as being "Certificate of Deposit California National Bank, No. 6479, May 23, 1891, $7,500."

7,500/00 Dollars.
No. 6479.

THE CALIFORNIA NATIONAL BANK

SAN DIEGO, Cal., May 23, 1891.

J. W. Collins has deposited in this Bank Seventy-five hundred dollars, payable to the order of himself, on return of this certificate properly endorsed.

(Signed) G. N. O'BRIEN, Cashier.

476

Endorsed: J. W. Collins. Pay to the order of Olin Wellborn for collection and proof of claim in name of S. N. Wood, of Denver, Colo.

Plaintiff's Exhibit No. 19.

Described as being "Certificate of Deposit California National Bank, No. 6480, May 23, 1891, $7,500."

7,500/00 Dollars.
No. 6480.

477

THE CALIFORNIA NATIONAL BANK

SAN DIEGO, Cal., May 23, 1891.

J. W. Collins has deposited in this Bank Seventy-five hundred dollars, payable to the order of himself, on return of this certificate properly endorsed.

(Signed) G. N. O'BRIEN, Cashier.

Endorsed: J. W. Collins. Pay to the order of Olin Wellborn for collection and proof of claim in name of S. N. Wood, of Denver, Colo.

POOR COPY

478 **Plaintiff's Exhibit No. 20.**

Described as being "Certificate of Deposit California National Bank, No. 6481, May 23, 1891, $10,000."

10,000/00 Dollars.
No. 6481.

THE CALIFORNIA NATIONAL BANK

SAN DIEGO, Cal., May 23, 1891.

J. W. Collins has deposited in this Bank Ten thousand dollars, payable to the order of himself, on re-
479 turn of this certificate properly endorsed.

(Signed) G. N. O'BRIEN, Cashier.

Endorsed: J. W. Collins. Pay to the order of Olin Wellborn for collection and proof of claim in name of S. N. Wood, Denver, Colo.

Plaintiff's Exhibit No. 21.

Described as being "Deposit tag National Bank of Commerce, Kansas City, April 21, 1891."

480 Deposited with
The California National Bank
of San Diego, 4/21, 1891.

By Nat. Com. K. C. Let. 4/11
Credit of J. W. Collins.

Check 20,000.

BLEED THROUGH

Plaintiff's Exhibit No. 22.

481

Described as being "Letter George N. O'Brien, February 10, 1891, to National Bank of Commerce, Kansas City, Missouri."

SAN DIEGO, Cal., Feby., 1891.

National Bank of Commerce,
Kansas City, Mo.,

Gentlemen:

We are in receipt of your January statement showing a balance due us of $1,908.09, and same agrees with our books, excepting the $25,000 item which we charged December 15th, and you do not show us 482
a credit, and which we both understand.

Yours truly,
G. N. O'BRIEN, Cashier.

Exhibit No. 23.

Described as being "Explanation Sheet." April 21, 1891.

National Bank of Commerce was charged $20,000 and J. W. Collins credited the same amount. The money being obtained on note J. W. Collins with his personal cheque as collateral as per letters to 483
the above bank attached.

It was understood that this bank could not draw against the amount, it simply being placed to the credit of the California National Bank in order to swell the bank's balance. First National Bank $25,000, May 18, 1891, was charged the sum named, the money being obtained on note of D. D. Dare, J. W. Collins, S. G. Havermale, T. R. Gay, and George N. O'Brien. J. W. Collins took credit for $40,000 on May 2nd, 1891, as per deposit slip marked Brunnell & Company, Chicago, and raised the cash

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484 in safe by carrying the amount as cash item until May 18, 1891. When the loan of $25,000 was made then First National Bank of Chicago was charged on the books of the California National Bank and cash item reduced like amount.

First National Bank of Chicago $10,000, October 13th, 1891.

Above bank charged the sum named and J. W. Collins' personal account credited like sum as per copy of telegram attached. The deal whereby J. W. Collins expected to realize the sum named failed to materialize and J. W. Collins failed to charge back the $10,000.

485

Union National Bank of Chicago, $20,000, March 25th, 1891.

The sum named was charged the above bank and J. W. Collins' personal account credited. The money being obtained from the note of Dare, Collins, Havermale, for like amount and endorsed by the bank.

National Park Bank of New York, $25,000, March 25, 1891.

The sum named was charged the Park Bank and J. W. Collins' personal account credited. The money
486 being obtained upon a note of Havermale, Collins and Collins & Dare for like amount and endorsed by the bank.

Western National Bank of New York, $20,000, October 13, 1891.

The sum named was charged the Western National Bank of New York and credited personal account of J. W. Collins, the money being obtained from a note for a like amount made payable to J. W. Collins and signed by California National Bank of San Diego, per J. W. Collins, president, with assets of the bank as collateral.

United States National Bank, $25,000, October 13, 1891. 487

The sum being charged the United States National Bank, and credited J. W. Collins' personal account, the money being obtained on a note signed by California National Bank and re-discounting the assets of the bank, also giving the bank discounted collateral.

National Bank of Republic of New York, $6,000.

Being balance due on note of Daniel Stone, endorsed by the California National Bank.

Certificate of Deposit. Bank of California, $35,000. 488

Note Dare, Havermale and Collins, dated September 18, 1891, due December 1, 1891, being $15,000 collateralized by C. D. 56,780 being $15,000 over issue. Note Dare and Havermale, dated October 19, 1891, due December 11, 1891, for $20,000 collateralized by C. D. 6633 over issue above notes being endorsed by J. W. Collins and credited his account.

Denver National Bank, Denver, $20,000, June 13, 1891.

The sum named was charged above bank and credited personal account of J. W. Collins, money being obtained upon note of J. W. Collins for $25,000 collateralized by C. D. 489

6479	$ 7,500	dated May 28, 1891
4480	7,500	
6481	19,000	

being over issue. The difference went to pay off some old debt of J. W. Collins.

C. D. 6800 for $7,500, dated September 22d, 1891, payable to J. W. Collins. In hands of Western National Bank as security for note Collins and Stebbins for $7,500. No funds deposited, and cheque was drawn and never charged to account of J. W. Collins.

C. D. 6801 for $7,500, dated September 22, 1891, in

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490 hands of First National Bank of Omaha, payable to J. W. Collins. No funds deposited and cheque was drawn but not charged to account of J. W. Collins. (Plaintiff's Exhibit 23, October 23, 1894).

Exhibit No. 24.

Being described as letter from plaintiff to defendant.

SAN DIEGO, Cal., May 23rd, 1892.

AMERICAN SURETY COMPANY,
160 Broadway, New York, N. Y.

491 Dear Sir,—I write to notify you that the California National Bank held a bond to the amount of $20,000.00 in its favor for the faithful performance of duties by J. W. Collins, its late President, also in favor for the faithful performance of duties by Geo. N. O'Brien, its Cashier, for $15,000.00. I therefore notify you that a discovery of fraud has been made of sufficient amount to require the payment of those indemnity bonds to the undersigned receiver of the California National Bank.

I therefore ask that you forward us the necessary blanks to make the claim or claims in proper form.

Respectfully yours,

492 FREDERICK N. PAULY,
Receiver.

Exhibit No. 25.

Described as being letter of plaintiff to defendant, May 31, 1892.

SAN DIEGO, Cal., May 31st, 1892.

TO THE AMERICAN SURETY CO. OF NEW YORK:

Notice is hereby given that J. W. Collins, late President of the California National Bank of San

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Diego, California, between the 1st day of July, 1891, 493
and the 1st day of January, 1892, as such President and while so employed as such by the said California National Bank of San Diego, at San Diego, California, and while having in his possession the monies, securities and personal property of said California National Bank of San Diego, did embezzle, misappropriate and misapply the funds of said Bank to a large amount exceeding twenty-five thousand dollars ($25,000); and in pursuance of the terms of that certain bond numbered 85,495, heretofore issued by your Company, in which you agree to make good and reimburse to said California National Bank of San Diego, all and any pecuniary loss sustained during the continuance of the bond, 494
on account of the fraud or dishonesty upon the part of said J. W. Collins, after a written statement of said loss is presented, this notice is given in writing by the undersigned Frederick N. Pauly, the Receiver of said California National Bank of San Diego, appointed December 18th, 1891, by the Comptroller of the Currency of the United States; and attached hereto is a statement of the loss, duly certified by the undersigned Receiver, now the Representative of said Employer named in the bond.

The said J. W. Collins having deceased on the third day of March, 1892, and this notice being given as soon as practicable after the occurrence of the 495
wrongful acts hereinbefore referred to, and demand is hereby made upon you by the undersigned as representative of said bank and as such Receiver, for the sum of twenty-five thousand dollars, the amount in said bond stipulated.

Respectfully yours,

FREDERICK N. PAULY,

Receiver.

POOR COPY

496

Exhibit No. 26.

Being described as Affidavit, verified May 31, 1892, at San Diego.

STATE OF CALIFORNIA, }
County of San Diego. }

Before the undersigned authority, personally came Frederick N. Pauly, who being by me first duly sworn on oath says:

That heretofore, on the 18th day of December A. D. one thousand eight hundred and ninety-one, he was, by the Honorable E. S. Lacey, Comptroller of the
497 Currency of the United States, appointed Receiver of the California National Bank of San Diego, California, a Banking Corporation organized and existing under the National Bank Act, at said City and State, and has ever since remained and now is the Receiver of said Bank.

That immediately after his appointment as such Receiver, being advised that J. W. Collins, then President of said Association was thought to be short in his accounts and believed to have embezzled and misapplied the funds of said Association and did as such Receiver employ an expert Accountant to enter upon an examination of the books of said Bank.

498 That such investigation of the books of said Bank show and affiant avers the truth to be that said J. W. Collins, while President of said California National Bank of San Diego, to wit, on the 22d day of September, 1891, caused and procured to be issued to him a certificate of deposit, numbered 6,800, certifying that J. W. Collins had on deposit in said California National Bank of San Diego the sum of Seventy-five hundred dollars ($7,500), and on the same day caused and procured to be issued to him a certain other certificate of deposit, numbered 6,801, certifying that said J. W. Collins had on deposit in said California National Bank of San Diego the sum

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of Eighty-five hundred dollars ($8,500), both of said 499
certificates of deposit being made payable to the order of said J. W. Collins, while in truth and in fact the said J. W. Collins had no sum of money on deposit in said Bank and the said Bank was not indebted to him in any sum, but, on the contrary, he, the said J. W. Collins, was, on the 22d day of September, 1891, largely indebted to said bank, which said certificate of deposit so issued to said J. W. Collins, he, the said J. W. Collins, sold and discounted or used as collateral for individual notes with other Banks and parties, and obtained thereon the sum of Sixteen thousand dollars ($16,000), which sum of $16,000 he, the said J. W. Collins, about the 22d day of September, 1891, appropriated to his own 500
use and then and there embezzled said sum.

That on the 13th day of October, 1891, he, the said J. W. Collins, as President of said Bank, and upon the representation that he was acting in behalf of said California National Bank of San Diego, obtained a loan from the United States National Bank of New York of twenty five thousand dollars upon a note of the California National Bank of San Diego and by rediscounting the assets of said Bank and took and applied said sum of $25,000, then and there the assets of said bank, to his individual use and embezzled said sum.

That on the same day, to wit, on October 13, 1891, said J. W. Collins, while president of said bank and 501
acting as such president, and upon the representation that he was acting in behalf of the said bank, obtained from the Western National Bank of New York a loan of twenty thousand dollars ($20,000) upon a note of said bank, made payable to himself and collateralized with assets of said bank, and then and there, as such president, receiving said sum of twenty thousand dollars ($20,000), and in behalf of the said California National Bank of San Diego, and appropriated the same to his individual use and embezzled the same.

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502 That afterwards, on the 31st day of October, 1891, of the funds of the said California National Bank of San Diego, the sum of ten thousand dollars ($10,000), the said J. W. Collins, as president of said bank, then and there abstracted and appropriated the same to his own use, by then and there causing the procuring the account of said J. W. Collins with said bank to be credited with said sum of ten thousand dollars without depositing any sum in said bank or paying said bank any consideration therefor, and without being entitled then and there to said credit, then and there used and appropriated to his own use said sum of ten thousand dollars ($10,000) so abstracted from
503 said bank, and so credited to his individual account without consideration as aforesaid.

Affiant says that none of said sums of money, so as aforesaid by said J. W. Collins abstracted and embezzled, nor any part thereof, were ever repaid or returned to said bank; but the said J. W. Collins is now indebted to said bank for the full amount thereof, in addition to other and greater amounts embezzled, abstracted and misappropriated by said J. W. Collins while such president, at various other dates and times.

Affiant further says: That the fact of, nature, extent, amount and circumstances connected with said embezzlement, misappropriation and misapplication
504 as aforesaid, have come to his knowledge and the knowledge of the said California National Bank of San Diego within the last six (6) months, to wit: since the 1st day of February, 1892.

FREDERICK N. PAULY.

Subscribed and sworn to before me this 31st day of May, A. D., 1892.

W. D. BLOODGOOD,
[SEAL.] Notary Public,
For San Diego County,
State of California.

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Exhibit No. 27.

Described as being Letter from defendant to plaintiff, May 31st., 1892.

MAY 31, 1892.

Mr. FREDERICK N. PAULY, Receiver,
California National Bank,
San Diego, Cal.

Dear Sir,—We are this morning in receipt of your letter of the 23rd instant stating that you have discovered fraud on the part of J. W. Collins, late President of the California National Bank and on the part of George N. O'Brien, late Cashier of said Bank, sufficient to require the payment by this Company under Bonds heretofore issued upon the parties named, in favor of the said California National Bank.

I transmit herewith two claim blanks with three continuation sheets with each, upon which please itemize any claim you may have to present under the bond of J. W. Collins, also upon the bond of George N. O'Brien, showing the precise dates of the alleged embezzlements on the part of said John W. Collins and said George N. O'Brien, and the amounts thereof, after which please attest the same under oath and transmit them to this office, furnishing our Inspector, Mr. Bradbury Williams, who will call upon you, a duplicate statement of the items with the dates thereto attached, so that he may be able to verify the account.

Will you also please inform me where George N. O'Brien is at present, and whether you have made a formal demand upon him for the amount alleged to be due, and whether he has refused to pay the same; also the date of said demand, and if made in writing, will you please send us a copy of said demand and furnish a copy to our Inspector, Mr. Bradbury Williams.

We desire to have you perfect your claims with

POOR COPY

508 the utmost expedition, and when received they will be duly considered.

Yours truly,
H. D. LYMAN,
Vice-President.

Exhibit No. 28.

Described as being Letter Plaintiff to defendant, June 24, 1892, received July 1, 1892.

SAN DIEGO, Calif., June 24th, 1892.

HENRY D. LYMAN, V. P. American Surety Co.,
509 160 Broadway, New York City.

Dear Sir,—In reply to yours of 31st ult., I hand you herewith two affidavits in regard to the embezzlement of the late J. W. Collins and Geo. N. O'Brien, furnished after consultation with my legal advisor, as giving information fuller than I otherwise could do by using the blank sent me in your favor of above date. Mr. G. N. O'Brien is still living in San Diego City. A formal demand was made upon him in writing for the amounts embezzled by his aid and assistance from the California National Bank, to which he has as yet made no reply. The affidavit herein relative to J. W. Collins includes an item of $10,000 discovered after making the affidavit
510 sent you before. Duplicate affidavits and copy of the demand made upon G. N. O'Brien will be furnished your Mr. Bradbury Williams when he calls. Trusting you will find this statement explicit enough for your purpose and that we may in the near future receive payment from you as required under the bonds that should guarantee the California National Bank against loss on the part of the hereinbefore mentioned J. W. Collins and Geo. N. O'Brien.

Truly Yours,
FREDERICK N. PAULY,
Receiver.

BLEED THROUGH

Exhibit No. 29.

511

Described as being Letter of defendant to plaintff, July 8, 1892.

JULY 8, 1892.

Mr. FREDERICK N. PAULY, Receiver,
California National Bank, San Diego, Cal.

Dear Sir,

We are in receipt of your two letters of the 24th ultimo transmitting two affidavits relative to the claim under the bonds of this Company to the California National Bank for J. W. Collins and George N. O'Brien in the respective positions of President 512
and Cashier of said Bank. We have respectfully to request that you will make a statement of each of the claim forms which we use for that purpose, two of which are herewith enclosed. We desire full information in regard to the shortages and credits, of every kind whatever, whether on account of salary due, money paid or assignments made by either of said persons to the California National Bank. If there has been any action brought against Mr. George N. O'Brien, or any correspondence between the bank or you, with either of the persons in regard to the matter, we should be pleased to have copies thereof.

Yours truly,
513
H. D. LYMAN,
Vice-President.

POOR COPY

514

Exhibit No. 30.

Being described as Letter plaintiff to defendant July 18, 1892.

JULY 18th, 1892.

HENRY D. LYMAN, Esq., V. P.,
American Surety Company, New York City.

Dear Sir,

In reply to yours of the 8th inst., relative to my claim under the bonds of your Company to the California National Bank for J. W. Collins and G. N. O'Brien, I beg to herewith send you a statement
515 of account of J. W. Collins, showing the amount of his deficiency to be $374,978.22. A list of the property assigned by J. W. Collins to the California National Bank with the estimation of the value thereof. J. W. Collins under the name of Dare & Collins is a defaulter to the Bank in the sum of $348,703.52 in addition to the amount above stated. An itemized statement of that account can also be forwarded you if desired.

With regard to G. N. O'Brien, no action has been brought against him, because he is execution proof. In reply to my demand for payment for the amounts embezzled by J. W. Collins, during the term covered by these bonds, he replied as per copy of his
516 letter herewith enclosed.

In compliance with the request of the U. S. Attorney, I appeared before the Grand Jury and testified as to the state of facts that existed implicating G. N. O'Brien in the defalcations with J. W. Collins. What action the Grand Jury will take has not yet transpired.

Trusting that these statements will meet your requirements, I am

Very respectfully,

FREDERICK N. PAULY,
Receiver.

Exhibit No. 31.

517

Being described as Letter defendant to plaintiff, July 26, 1892.

July 26, 1892.

Mr. FREDERICK N. PAULY, Receiver.

California National Bank, San Deigo, Cal.

Dear Sir,—

Yesterday afternoon we received your communication of the 16th instant and its enclosures, making formal demand against this Company under Bonds of the late J. W. Collins and G. N. O'Brien, formerly the President and Cashier respectively of the 518
California National Bank, and for information in regard to the whole case we have referred copies of documents to our Inspector, Mr. Bradbury Williams, for investigation and report. You do not transmit to us a copy of your letter of the 20th of June, addressed to Mr. George N. O'Brien, to which he replied on June 24th last as per copy transmitted by you.

Inquiry into this matter cannot necessarily be completed for some time by reason of the peculiar situation of affairs, and also because of the enforced absence of Mr. Williams on other matters, which will delay him for some two weeks or more. Please give Mr. Williams all the information he desires, in order that full advices may be transmitted to this 519
Company at the earliest practicable date, so that we may pass intelligently upon the claim in question.

Yours truly,

H. D. LYMAN,
Vice-President.

520

Exhibit No. 32.

Letter plaintiff to defendant, August 1st., 1892.

AUG. 1st., 1892.

H. D. LYMAN, Esq., V. P.
American Surety Co.,
160 Broadway, New York.

Dear Sir,—Yours of 26th ult., acknowledging receipt of mine of 18th. inst and enclosures, making a formal claim against the American Surety Company under the bonds of J. W. Collins and Geo. N. O'Brien, the former President and Cashier
521 respectively of the California National Bank, duly received. I was not aware that you required a copy of my letter, addressed to Mr. G. N. O'Brien, Cashier, hence the omission to include it. I hereby enclose copy of said letter. Your request to give your Mr. Williams all the information he desires in order that full advices may be transmitted to your Company noted and will have my attention whenever Mr. Williams makes request for said information.

Respectfully yours,
FREDERICK N. PAULY,
Receiver.

522

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Exhibit No. 33.

Being described as Letter defendant to plaintiff August 8, 1892.

NEW YORK, August 8, 1892.

Mr. FREDERICK N. PAULY, Receiver,
California National Bank,
San Diego, Cal.

Dear Sir,—We acknowledge receipt to-day of your letter of the 1st. instant, with copy of your

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letter of the 20th of June last addressed to George 523
N. O'Brien, making demand upon him for moneys alleged to have been misappropriated and embezzled from the California National Bank by his aid and assistance.

Yours truly,
H. D. LYMAN,
Vice-President.

Exhibit No. 34.

Being described as Letter plaintiff to defendant September 6, 1892.

SAN DIEGO, Cal., Sep. 6th, 1892. 524

Mr. H. D. LYMAN, Vice-Pres't,
American Surety Co., 160 Broadway, N. Y.

Dear Sir,—It is now almost six weeks since I received yours of 26th of July acknowledging receipt of our claims under bonds of the late J. W. Collins $25,000, and Geo. N. O'Brien, $15,000, respectively, since which time I have heard nothing from you. I would like to know how soon we may expect a payment of our claims as stated therein.

Truly yours,
FREDERICK N. PAULY,
Receiver.

525

Exhibit No. 35.

Being described as Letter defendant to plaintiff, September 14, 1892.

SEPTEMBER 14th, 1892.

Mr. FREDERICK N. PAULY,
California National Bank,
San Diego, Cal.

Dear Sir,—In reply to your letter of the 16th instant, and referring to my letter of the 20th of July,

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526 in the matter of J. W. Collins and George N. O'Brien, I have to state that our Inspector, Mr. Bradbury Williams, who has charge of this case, was sent to Vancouver, B. C., on an important matter and was detained first for three days on account of small pox quarantine at that point, and afterwards by sickness which has prevented him from getting back to San Diego as soon as we had hoped. I expect that he will shortly be able to reach San Diego and take up the inquiries in this case to determine the merits of your claim.

All that we have from you is what purports to be a transcript of Mr. Collins' personal account in the Bank upon which, at the time the Bank stopped
527 business, there appears a large balance due. On the face of the documents, it appears that Mr. Collins had a running account and credit beginning as far back as May 18, 1888, and that when the Bank accepted our bond, the account appeared overdrawn $149,276.08 or on June 29th, 1891. I merely call your attention to this and inquire whether this is a fact.

Yours truly,

H. D. LYMAN,
Vice-President.

Exhibit No. 36.

528 Being described as Letter of plaintiff to defendant September 21, 1892.

SAN DIEGO, Cal., Sept. 21, 1892.

H. D. LYMAN, Esq., V. P.
American Surety Company, 160 Broadway,
New York City.

Dear Sir,—Yours of 14th. inst. replying to mine of 6th. inst. in the matter of J. W. Collins and George N. O'Brien, received and contents fully noted.

The running account that I sent you as showing Mr. Collins' standing with the California National

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Bank represents that account after correction of 529
erroneous and fraudulent entries and does not show what the books showed on June 29th, 1891. On that date by the book of J. W. Collins appeared to have $68,175.67 to his credit.

There has been so much delay in this matter, that I have placed it under the direction of the Comptroller, in the hands of the U. S. Attorney, in New York, Edward Mitchell, Esq., with instructions to collect the same.

Respectfully yours,

FREDERICK N. PAULY,

Receiver.

530

Exhibit No. 37.

Being described as Letter defendant to plaintiff, September 28th, 1892.

SEPTEMBER 28, 1892.

Mr. FREDERICK N. PAULY, Receiver.

California National Bank, San Diego, Cal.

Dear Sir, —We are in receipt to-day of your letter of the 21st instant in the matter of J. W. Collins and George N. O'Brien and observe by the last paragraph of your letter that by direction of the Comptroller, you have placed the matter in the hands of the United States Attorney in New York, Edward Mitchell, Esq., with instructions to collect the same. 531
Will you please inform me whether you have forwarded to Mr. Mitchell all the books and evidence in the case? We trust not because we have instructed our Inspector, Mr. Bradbury Williams, to go to San Diego and investigate the whole subject and make report so that we may intelligently be advised on all the points. It is some distance to San Diego and there is considerable expense attending an inquiry of the kind and it can be better carried on at San Diego than anywhere else. We are well pleased

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532 that when taking up the matter finally, we can deal here with the United States Attorney on the merits of the case, and it will be most convenient for the attorney and this Company.

Your truly,
(Sgd.) H. D. LYMAN,
Vice-President."

Plaintiff's Exhibit No. 38.

Described as being Letter Frederick N. Pauly to H. D. Lyman, Vice-President, October 4th, 1892.

533

"SAN DIEGO, Cal., Oct. 4th, 1892.

H. D. LYMAN,
American Surety Co.,
New York City.

Dear Sir:

Replying to yours of 28th inst. in the matter of J. W. Collins and George N. O'Brien, answering your question as to whether all of the books and evidence in the case have been forwarded to the U. S. Attorney in New York, I beg to state that they have not. Such evidence, however, will be forwarded the U. S. Attorney as he may need for his purpose. We shall, however, retain in the office here information to
534 satisfy Mr. Bradbury Williams upon any point that he may desire information.

Yours truly,
FREDERICK N. PAULY,
Receiver."

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Exhibit No. 39.

535

Designated as statement of account sent by plaintiff to defendant with letter of July 18, 1891.

1888.		1888.	
Jan. 19	10 00	Jan. 9	5,000 00
23	5,000 00	12	2,000 00
23	500 00	23	4,387 00
25	5 00	28	3,960 00
24	72 50	Feb. 27	500 00
27	10 00	28	2,000 00
28	1,000 00	Mar. 2	3,917 33
30	50 00	5	3,333 75
30	2,875 00	10	5 00
30	50 00	26	100 00
30	25 00	27	4,000 00
Feb. 4	6 00	Apr. 2	450 00
6	686 45	6	15 75
6	890 35	10	2,561 50
6	400 00	17	21 38
7	1 00	25	100 00
28	3,000 00	Mar. 1	2,164 75
29	4,000 00	7	3,575 00
Mar. 2	200 00	12	19 00
2	1 95	14	27 70
2	511 12	15	4,500 00
5	10 00	18	1,500 00
6	218 55	19	132 00
6	144 00	21	1,500 00
6	3,500 00	25	750 00
7	10 00	June 2	16 25
9	2 00	1	150 00
10	67 50	6	3,775 00
Mar. 10	30 00	June 28	1,700 00
10	75 00	July 2	150 00
15	25 00	5	31 75
15	5 00	27	1 00
15	25 00	31	150 00

536

537

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538 1888.

	15	200 00
	28	3,000 00
	31	750 00
	31	45 00
Apr.	2	25 00
	3	10 00
	5	30 00
	10	30 00
	11	55 00
	13	25 00
	17	4,231 00
	18	1 60
	20	10 00
539	10	1,030 00
May	1	75 00
	4	552 55
	7	5 00
	9	2 50
	15	111 63
	10	25 00
	9	2 25
	12	122 50
	12	14 00
May	12	20 00
	11	23 33
	14	8 00
540	14	2,650 00
	15	5,500 00
	15	39 65
	16	156 25
	18	3,000 00

Page 1 of Exhibits ends here.

Total.... 45,036 68

May	18	131 50
	5	93 00
	19	12 50
	21	13 75

1888.

Aug.	7	500 00
	9	3,928 00
	14	25
	14	300 00
	14	83 33
	18	31 00
	20	40 00
	23	100 00
	27	20
	31	150 00
Sept.	29	855 25
Oct.	3	150 00
	6	166 66
	6	1,107 13
Oct.	17	40 00
	23	156 32
Nov.	12	300 00
	13	4,000 00
	19	83 33
	21	3,000 00
Dec.	3	25 00
	4	337 19
	8	1,100 00
Dec.	29	25 00

1889.

Jan.	7	25 00
	8	100 00
	10	534 00
	16	699 75
Feb.	2	134 15
	5	565 81
Total		71,629 53

Feb.	6	900 00
	6	50 00
	15	994 90
	23	43 32

BLEED THROUGH

10958

				1889.			541
	22	25 00	Mar.	11	400 00		
	18	66 70		14	5 00		
	21	750 00	Apr.	1	1,000 00		
	23	50 00	May	4	200 00		
	28	32 45		22	1,107 39		
June	1	173 75	June	3	499 98		
May	31	500 00		20	43 23		
June	1	9 56	July	3	164 50		
	4	30 00		6	1,150 00		
	2	3 00		16	50 00		
	7	13 00		20	2 50		
	12	25 00	Aug.	12	1,500 00		
	12	4,000 00		2	1,900 00		
	12	35 00		20	3,279 52	542	
	12	65 00		30	296 88		
June	13	200 00	Aug.	31	100 00		
	14	200 00	Sept.	21	1,000 00		
	11	10 00		24	1,789 25		
	12	65 00	Oct.	2	50 00		
	23	1 30		14	7,500 00		
	12	50 00		25	4,000 00		
July	3	150 00	Nov.	1	50 00		
	3	45 00		2	5,000 00		
	19	67 50	Nov.	6	39 00		
	10	490 84	Dec.	2	50 00		
	17	84 17		11	57 60		
	17	166 66		24	5,000 00		
	20	250 00		27	2,080 00	543	
	20	46 66		31	500 00		
				1890.			
	21	330 00	Jan.	3	359 66		
	21	57 00		4	1,140 00		
	25	20 00		13	666 66		
	26	5 00		13	92 50		
	31	10 00		17	150 00		
	31	6 25		18	50 00		
Aug.	1	6 75		21	6,000 00		
	1	40 00	Feb.	1	50 00		
	1	75 00		6	1,000 00		

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544

			1890.		
	2	10 00		14	5,500 00
	6	112 50		19	7,000 00
	8	500 00		20	136 08
	22	4,500 00		28	5,000 00
	23	14 60	Mar.	8	50 00
	23	5 00		22	1,000 00
	24	10 00		24	10 00
	27	10 00		26	5,000 00
	24	10 00		31	490 00
Sept.	3	10 00	Apr.	4	7,500 00
	4	19 78		16	50 00
	3	5 00		19	28 55
	4	100 50		24	5,000 00
545	5	82 25	May	2	50 00
	6	218 55		2	193 00
	15	10 00		6	48 25
	12	10 00		10	512 50
	14	46 66		13	750 00
	10	200 00		31	1,250 00
	10	30 00	May	21	500 00
	15	25 00	June	3	50 00
Page 2 of Exhibits ends here.					
Total		14,371 93			96,482 67

Sept.	20	15 00	June	7	4,495 00
	20	61 14		9	625 00
	8	10 00		11	337 97
	27	17 00		11	14 25
546	28	1,555 00		18	4,000 00
	29	10 00		20	1,875 00
Oct.	1	6 25		28	215 75
Sept.	25	3 80		30	1,977 00
	29	517 13	July	3	281 50
Oct.	2	15 22		8	41 67
	4	5 00		9	1,595 00
Oct.	5	5 00	July	14	125 00
	2	7 05		15	2,000 00
	6	573 00		16	7,000 00
	6	44 85		17	1,867 71
	8	50 00	Aug.	1	50 00
	8	10 00		25	963 10

BLEED THROUGH

10959

			1890.			547
	8	100 00	Sept.	2	50 00	
	10	50 00		12	34 78	
	9	13 00		12	50 00	
	13	500 00		13	8 50	
	12	20 00		24	27,500 00	
	13	5 00		24	25,000 00	
	13	50 00	Oct.	2	50 00	
	15	150 00		4	1,348 33	
	15	100 00		6	100 00	
	8	30 00		9	250 00	
	10	305 00		20	75 00	
	27	10 00		22	1,140 20	
	31	30 00		25	35 00	
	31	111 50		28	15,000 00	548
Nov.	1	25 00			12 50	
	4	1 05			465 00	
	16	3 00		30	62 50	
	19	50 00	Nov.	5	242 50	
	16	100 00		5	15,000 00	
	24	10 00		5	500 00	
	27	80 88		26	10,000 00	
Dec.	1	300 00	Dec.	1	501 50	
	1	458 00		1	50 00	
	1	81 38		10	330 05	
	3	1 50		11	10 40	
	3	50 00		13	10,000 00	
	3	624 88		15	350 00	
	1	1,088 10		22	12,000 00	
	1	337 19		26	54 80	549
	3	150 00		30	1,000 00	
	4	10 00				
			1893.			
	4	250 00	Jan.	2	50 00	
	5	5 00				
	6	9 50			150 00	
	6	24 00				
	7	10 00		12	312 50	
	7	106 00				
	10	2 60			1,345 00	
	11	30 30		16	125 00	

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550

			1893.		
	13	10 00		19	11,087 51
	13	50 00		22	300 00
	15	200 00		30	3,483 18
	15	20 90		4	50 00
	18	10 00	Feb.	7	698 50
	19	50 00		7	125 00
	7	229 90		10	1,000 00
				14	58 75
				20	250 00
			Mar.	6	1,000 00

Page 3 of Exhibits ends here.

	Total	8,759 12		Total	170,595 48

551

	1888.				
Dec.	31	50 00	Mar.	7	250 00
	21	75 00		7	1,531 98
	24	500 00			
	27	25 00			
	29	47 50		12	20,456 21
	24	100 00		18	10,000 00
	31	250 00		19	762 32
	1890.				
Jan.	1	3 50		30	1,230 00
	4	4 00	Apr.	9	12,500 00
	4	9 40		11	500 00
	12/31	290 00		13	3,750 00
552	1/ 7	1,030 00		16	4,500 00
	8	200 00	May	7	383 00
	11	1,000 00		8	16,000 00
	15	93 33			
	18	5 00		13	1,250 00
	22	1 00			
	23	15 00	June	1	5,880 00
	22	10 00		20	550 00
	25	20 00	July	15	125 00
	27	14 50		23	39,145 34
	28	5 00		31	264 00
	30	40 00		31	20,000 00
	30	3 00		31	10,000 00

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10960

1890.

Feb.	2	13 00	Aug.	3	839 13	553
	5	15 00				
	2	6 25		4	1,385 00	
	4	67 50		10	2,000 00	
	4	694 90		12	777 08	
	4	50 00		12	412 50	
	4	362 50		18	25 00	
	7	10 00			500 00	
	7	4 90			2,500 00	
	7	32 00		26	20 50	
	9	10 00	Sept.	1	625 00	
	12	2 00		10	200 00	
	21	25 15				
	21	20 00		12	3,000 00	554
	28	5 00	Oct.	1	54 00	
	28	50 00		7	8,000 00	
Mar.	4	20 00		12	5,000 00	
	6	14 00		17	138 79	
	9	200 00		24	2,082 50	
	10	10 00	Nov.	3	8 53	
	14	906 68		6	8,250 00	
	16	20 00		10	10 00	
	18	10 00		11	500 00	
	18	5 00			18,640 88	
	7	668 55				
	19	20 00				
	20	200 00				
	21	146 50				555
	23	2 00				
	25	16 00				
	27	5 00				
Apr.	1	45 00				
Apr.	2	23 00				
	3	5 00				
	4	6 60				
	6	25 00				
	6	1 00				
	9	5 60				
	9	3 86				

Page 4 of Exhibits ends here.

Total.... 7,818 22

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556	1890.		
	Apr.	9.....	5 00
		12.....	19 15
		12.....	22 50
		12.....	100 00
		20.....	20 00
	May	1.....	19 75
		5.....	2,300 00
		2.....	1 25
		2.....	2,200 00
		3.....	5 00
		4.....	3 00
		3.....	50 00
		3.....	50 00
557		3.....	50 00
			225 00
		3.....	362 50
		6.....	2,387 60
		7.....	91 37
		8.....	120 00
		8.....	13 00
		9.....	60
		9.....	25 15
		9.....	20 00
		13.....	100 00
		15.....	5 00
		18.....	942 50
		20.....	758 94
558		21.....	15 00
			1,000 00
		11.....	1 00
		27.....	5 00
		31.....	10 00
		31.....	20 00
	June	2.....	5 00
		4.....	6 65
		3.....	50 00
		5.....	80 00
		5.....	5 00
		4.....	65
		13.....	116 65

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10961

1890.			559
	20	20 00	
		6 00	
	21	7 00	
	22	300 00	
	25	2 00	
	27	40 80	
	30	6 00	
	30	5 00	
July	1	27 00	
	2	78 60	
	5	65 00	
	6	11 80	
	6	2,998 80	
	6	6 00	560
	10	4 00	
	16	5 00	
	20	7 21	
	23	145 00	
	24	15 00	
		90 00	
	27	100 00	
		1 50	
	29	3 00	

Page 5 of Exhibits ends here.

Total		12,904 62	
July	31	531 00	
Aug.	2	25 15	
	14	15 00	561
	15	884 57	
	15	362 50	
	15	1,900 00	
	15	210 00	
	27	315 00	
Aug.	20	5,000 00	
	19	416 66	
	20	6 00	
	26	487 00	
	15		
	26	200 00	

POOR COPY

562	1890.		
		29.....	1 00
			65
	Sept.	2.....	40 25
		5.....	13 50
	Aug.	23.....	50 00
	Sept.	6.....	218 55
		7.....	20 00
		9.....	2 00
		21.....	4 50
		24.....	157 50
		25.....	10 00
		26.....	41 60
		27.....	1 00
563		30.....	5 00
			20 00
		26.....	6 00
	Oct.	10.....	5 00
		10.....	600 00
		14.....	123 00
		14.....	150 00
		19.....	5 00
		19.....	20 00
		7.....	7 50
		21.....	50 00
		7.....	1 25
	Oct.	25.....	48 55
		25.....	61 20
564		25.....	1,500 00
		25.....	2,250 00
		29.....	2 00
		29.....	2 00
		30.....	5 00
		30.....	700 00
	Nov.	1.....	22 50
		2.....	45 50
		2.....	77 50
	Oct.	30.....	2 50
	Nov.	2.....	5 00
		4.....	984 00
		5.....	50 00

BLEED THR

1890.			565
	5	5 00	
	13	4,000 00	
Dec.	31	362 50	
Nov.	17	180 50	
	9	17 85	
	8	20 00	
	9	55 04	
	14	100 00	
	14	1,440 00	

Page 6 of Exhibits ends here.

Total, 25,610 02

	15	199 10	
	15	65 65	566
Nov.	22	10 00	
	30	35 00	
	30	1,200 00	
Dec.	2	5 50	
Nov.	30	5 00	
Dec.	3	226 90	
	3	48 00	
	4	20 00	
	4	85	
	4	120 00	
	4	55 00	
	6	1,000 00	
	10	136 08	
	10	50 00	
	11	3 00	567
	11	370 00	
	15	5,000 00	
	13	84 00	
	17	10 00	
	18	1,050 00	
	16	3 75	
	19	5 00	
	20	10 00	
	23	12 00	
	21	218 55	
	24	10 00	

UGH POOR COPY

568	1890.		
		26.....	2,080 00
		27.....	1,800 00
	Dec.	17.....	17 10
		30.....	5 00
		31.....	30 00
		31.....	290 00
	1890.		
	Jan.	2.....	35 00
	12/31/89	....	15 00
	12/31/89	....	5 00
	Jan.	2.....	18 35
		2.....	26 00
		6.....	4 00
569		2.....	22 60
		7.....	5 00
		7.....	43 75
		9.....	308 00
		10.....	410 00
		9.....	3 50
		13.....	102 00
		15.....	40 00
		14.....	10 00
		16.....	15 00
		17.....	25 00
		17.....	50 00
		21.....	1,068 00
		21.....	1,900 00
570		21.....	300 00
		21.....	150 00
		28.....	50 00
		25.....	82 92
		27.....	35 32
	Feb.	7.....	500 00
		7.....	20 00
		5.....	1 00

Page 7 of Exhibits ends here.

Total.... $18,876 47

BLEED THROUGH

1890.			571
	15	3 25	
	17	50 00	
	15	303 00	
	18	150 00	
	18	150 00	
	20	150 00	
	20	2,597 00	
	21	4,500 00	
	28	60 00	
Mar.	1	100 00	
	3	20 00	
	2/28	6 00	
	26	1 00	
	3/4	20 50	572
		15 00	
	3	10 00	
	5	2 00	
	6	218 55	
	3	40 30	
	6	10 00	
	7	1 00	
Mar.	11	10,000 00	
	13	15 00	
	12	25 00	
	18	5 00	
	18	20 00	
	14	100 00	
	14	750 00	573
	18	1,000 00	
	24	21 00	
	24	3,500 00	
	26	21 70	
	27	1 00	
	28	11 50	
	27	60 00	
	29	1,500 00	
Apr.	1	20 50	
	1	8 75	
	3	10 00	
	3	37 57	

POOR COPY

574 1890.

	4.....	75 00
	3.....	50 00
	3.....	700 00
	1.....	100 00
	4.....	10 35
	5.....	10 00
	8.....	3,000 00
	8.....	164 00
	11.....	15 00
	7.....	500 00
	11.....	4 15
	14.....	5 00
	16.....	100 00
575	16.....	3 50
	20.....	5 00
	22.....	4,500 00
	21.....	50 00
	24.....	980 00
	24.....	50 00
	26.....	15 00
	22.....	1,375 00
	26.....	50 00
	30.....	1 00

Page 8 of Exhibits ends here.

Total.....37,277 62

	1.....	50 00
576	5.....	50 00
	5.....	95
	7.....	241 25
	8.....	75 00
	10.....	1 30
	10.....	50 00
	13.....	50 00
	2.....	20 30
	13.....	3 50
	13.....	416 67
	15.....	2 75
	15.....	23 42

BLEED THROUGH

1890.				577
Apr.	15	25	00	
	17	25	00	
	17	10	00	
May	1	100	00	
	20	1,610	00	
	20	5	00	
	22	20	00	
	22	1,500	00	
	23	120	00	
	27	1,146	83	
	30	250	00	
	29	1	00	
		75	00	
		11	00	578
		20	60	
	30	20	00	
	31	50	00	
June	3	125	00	
	3	1,000	00	
	3	100	00	
	3	4	00	
	4	15	00	
	3	2	50	
	4	1,500	00	
	4	500	00	
	7	628	99	
	5	10	00	
	9	5,000	00	579
	9	5	00	
	7	10	00	
	9	320	83	
	9	14	25	
	11	375	00	
	13	165	00	
	13	5	00	
	13	20	00	
	17	3	50	
	17	5	00	
	17	16	00	
	17	8	00	

POOR COPY

580	1890.		
		18.....	10 00
		18.....	3 00
		19.....	25 00
		20.....	25 00
		19.....	20 00
		20.....	2,040 00
		21.....	10 00
		21.....	147 50
		23.....	10 00
		24.....	13 25
		25.....	71 47
	Page 9 of Exhibits ends here.		
	Total.....		18,162 72
581			
		26.....	10 00
		26.....	10 00
		27.....	60 00
		30.....	20 00
		30.....	12 35
	July	1.....	26 50
		1.....	21 72
		1.....	20 00
		1.....	3 00
		1.....	892 80
		1.....	5 00
		1.....	2 00
		1.....	100 00
582		2.....	2 50
		2.....	500 00
		1.....	18 10
		2.....	16 55
		4.....	3 50
		3.....	474 44
		3.....	38 46
		3.....	2 50
		5.....	85 00
		5.....	15 00
		3.....	86 50
		11.....	2 00
		1.....	1 30

BLEED THROUGH

10963

1890.			583
	9	3 55	
	2	40 00	
	10	431 15	
	11	125 00	
	12	3 40	
	7	2 00	
	14	1 00	
	10	10 00	
	16	1 35	
	16	1,500 00	
	16	500 00	
	30	250 00	
	12	175 20	
	12	2 50	584
	24	2,000 00	
	31	244 00	
Aug.	1	8 00	
	1	2 50	
	1	39 70	
	2	3 00	
	2	9 35	
	2	2 50	
	2	18 00	
	24	2,000 00	
	31	244 00	
Aug.	1	8 00	
	1	2 50	
	1	39 70	585
	2	3 00	
	2	9 35	
	2	2 50	
	2	18 00	
	2	3 00	
	2	15 00	
	2	2 50	
Aug.	4	85	
	2	160 00	
	5	28 94	
	4	17 40	
	5	30 00	

POOR COPY

586 1890.

	17.....	10 00
	7.....	500 00
	9.....	5 00
	9.....	453 05
	9.....	50 00
	9.....	20 00

Page 10 of Exhibits ends here.

Total..... $9,023 01

	13.....	60 25
	13.....	35 50
	13.....	1,375 00
	14.....	2 25
587	18.....	2,077 85
	8.....	32 75
	20.....	10 00
	15.....	8 60
	21.....	7 00
	23.....	25 00
	25.....	280 00
	29.....	25 00
	30.....	1 00
	29.....	8 00
	28.....	5 00
	30.....	250 00
Sept.	6.....	218 55
	5.....	12 60
588	5.....	6 92
	10.....	143 40
	10.....	5 75
	10.....	20 00
	10.....	100 00
		161 65
	11.....	1 75
	5.....	8 54
		4 50
		14 00
		187 00
		15 00
		13 00

BLEED THROUGH

1890.			589
		15 85	
		97 95	
		190 50	
		25 00	
		33 00	
		14 00	
		13 30	
		600 00	
		14,370 69	
	18	27,500 00	
	22	556 11	
	24	10 00	
	27	5 00	
	20	55 00	590
Sept.	25	10,000 00	
	26	6,500 00	
		5 00	
	25	175 00	
	29	90	
Oct.	1	5 00	
	1	3 50	
	1	20 85	
	1	175 00	
	3	10 50	
	3	85	
	3	1 70	
	6	5,000 00	
	8	1 00	591
	8	298 00	
	11	18 00	
	14	75	
	14	348 54	

Page 11 of Exhibits ends here.

Total, $71,351.76.

		14 10	
	15	5 00	
	14	20,000 00	
	5	1 50	
	13	80 00	

POOR COPY

592	1890.		
		23.....	6 50
		23.....	180 00
		23.....	200 00
		24.....	10 00
		24.....	1,075 58
		25.....	5 00
		25.....	35 00
		25.....	25 00
		25.....	857 50
		25.....	76 82
			120 50
		25.....	8 00
		24.....	7 15
593	Nov.	1.....	10,000 00
		1.....	2 10
		1.....	59 05
		1.....	65 00
		3.....	13 00
		3.....	85
		1.....	3 00
		1.....	188 00
		5.....	225 00
		5.....	21 00
		5.....	5 00
		5.....	15,000 00
		6.....	480 39
		7.....	4 70
594		7.....	100 00
		7.....	4 42
		8.....	3 00
		8.....	8 00
		8.....	5 00
	Nov.	10.....	206 66
		10.....	10 00
		10.....	24 75
		10.....	1,687 00
		10.....	20 00
		7.....	40 00
		12.....	4 75
		8.....	63 56

BLEED THROUG

1890.			595
	12.....	25 00	
	17.....	33 25	
	14.....	40 00	
	19.....	15 75	
	19.....	2 90	
	20.....	325 00	
	20.....	793 05	
	20.....	1,000 00	
	22.....	200 00	
	22.....	250 00	
	27.....	79 62	
	24.....	8 75	
	26.....	24 00	
	27.....	5 00	596
	29.....	25 00	
	30.....	5 00	
		3 00	
		8 00	

Page 12 of Exhibits ends here.

Total.....$62,107 20

Dec.	2.....	6 00	
	1.....	14 75	
	3.....	25 00	
	4.....	55 00	
	2.....	10 20	
	6.....	4,000 00	
	5.....	15 00	597
	5.....	10 00	
	6.....	10 00	
	4.....	3 00	
	6.....	25 00	
	8.....	224 20	
	6.....	6 45	
	6.....	86 50	
	10.....	50 00	
	10.....	13 35	
	11.....	1 00	
	8.....	150 70	
	12.....	1 00	

POOR COPY

598	1890.		
		11.....	50 00
		13.....	10,000 00
		24.....	5 00
		17.....	5 00
		18.....	1 00
		9.....	1 00
		18.....	400 00
		18.....	10 00
		22.....	30 00
	Dec.	22.....	3,500 00
		22.....	12,000 00
		22.....	8,813 50
		23.....	20 75
599		23.....	20 00
		10.....	10 00
		25.....	5 00
		26.....	25 92
		24.....	278 36
		26.....	28 88
		27.....	25 00
		29.....	1,000 00
		8.....	15,000 00
		31.....	62 64
		31.....	4 40
		31.....	290.00
	1891.		
	Jan.	2.....	60
600		2.....	235 25
		2.....	2 85
		3.....	5 00
		3.....	5 00
		3.....	41 73
		6.....	17 25
		6.....	65 00
		6.....	4 00
		6.....	1,001 00
		6.....	1 00
		7.....	200 00
	Jan.	9.....	10 00
		12.....	5 00

BLEED THR

1891.			601
	13	120 00	
	20	21 00	
	21	15 00	
Page 13 of Exhibits ends here.			
Total		58,128 52	
	29	60 00	
	29	25 00	
		2 00	
	29	366 66	
Feb.	2	100 00	
	2	150 00	
	2	10 75	
	1	14 10	
	6	300 00	602
	11	314 00	
	11	70 00	
	12	106 40	
	14	10 00	
	14	20 00	
	16	3 50	
	12	1,000 00	
	17	13 45	
	17	5,800 00	
	12	100 00	
	20	1,000 00	
	27	30 00	
	25	120 00	
Mar.	1	5 20	603
Mar.	2	1,000 00	
	28	100 00	
	4	40 00	
	5	25 00	
	6	1,000 00	
	6	218 55	
	9	9 00	
	9	27 00	
	5	500 00	
	12	16 00	
	12	129 55	
	12	50 00	

UGH POOR COPY

604	1891.		
		13.....	5 00
		13.....	5 00
		14.....	100 00
		14.....	750 00
		14.....	68 90
		14.....	150 00
		16.....	100 00
		18.....	7 50
		18.....10,000 00
		19.....	762 32
		23.....	1 50
		23.....	375 00
		25.....	5 00
605		26.....	2,500 00
		27.....	5,555 60
		27.....	1,214 89
		27.....	4,760 65
		27.....12,000 00
		27.....	500 00
		27.....	6,000 00
		27.....	4,170 00
		27.....	190 00
	Apr.	1.....	14 70
		1.....	1 25
		2.....	307 78
		3.....	10 00
		2.....	31 25
606		1.....	100 00
		5.....	60 00

Page 14 of Exhibits ends here.

Total.....87,032 45

		7.....	40 00
		7.....10,776 48
		7.....	513 70
		7.....	47 00
		8.....	1,000 00
		5.....	5 00
		8.....	60 50
		2.....	18 50

BLEED THI

1891.			607
	2	120 00	
	10	40 00	
	14	15 55	
	16	76 38	
	17	1,500 00	
	18	85 00	
	22	219 87	
Apr.	24	120 00	
	18	7 70	
	22	500 00	
	27	2,000 00	
	26	5 00	
	27	414 00	
	30	100 00	608
May	1	5 50	
	2	440 00	
	7	6 70	
	7	1,666 66	
		52 00	
	8	5 00	
	12	5 00	
	8	7 40	
	13	1,005 15	
		4 00	
	14	8,500 00	
	15	5 00	
	16	84 59	
	18	1,000 00	
	18	565 50	609
Apr.	13	1,260 00	
May	19	200 00	
	22	12 00	
	23	60 00	
	23	583 33	
	23	350 00	
	23	60 00	
	23	72 50	
	26	1,610 00	
	23	50 00	

OUGH POOR COPY

610	1891.			
	June	4	306	67
		1	173	08
		1	400	00
		16	25	40
		12	150	00
		25	25	00
		27	200	00
		27	60	00
		27	50,000	00
		27	1,000	00
		28	2,000	00
		29	1,000	00
		30	4	00
611		29	50	00
		1	25	00
		2	18	00
		2	100	00

Page 15 of Exhibits ends here.

	Total		90,809	16
	July	3	102	41
		3	2,651	67
		3	122	50
		7	20,000	00
		7	5	00
		7	75	89
		7	151	11
612	July	9	4	85
		9	10	00
		11	7,500	00
		10	60	00
		11	100	00
		14	140	00
		14	40	00
		23	50,000	00
		23	80	00
		24	318	00
		24	50	00
		25	10,840	81
		24	60	00

BLEED THROUGH

10970

1891.				613
	27	842	72	
	27	50	00	
	27	2	00	
	29	50	00	
	27	195	20	
Aug.	1	1,500	00	
	5	5,880	00	
	9	1	00	
	5	98	05	
	3	21	25	
	10	67	17	
	7	100	00	
	11	412	50	
	11	6	00	614
	11	50	00	
	11	760	50	
	11	10,000	00	
	11	236	65	
	12	90	00	
		5	00	
	15	1,250	00	
	18	489	17	
	17	125	00	
	17	5	00	
	18	5	00	
	22	2,01[illegible]	57	
	22	[illegible]5	00	
	22	350	00	615
	23	16	00	
	31	513	33	
		16,500	00	
		6,080	00	
		118	50	
Sept.	1	56	25	
	1	5	00	
	2	4,000	00	
	2	50	00	
	2	1,547	34	
	5	136	00	
	5	30	00	

POOR COPY

616	1891.		
		7.....	218 55
		7.....	416 67
	Page 16 of Exhibits ends here.		
		Total....	160,593 65
	Sept.	10.....	15,000 00
		12.....	750 00
		14.....	1,134 37
		17.....	12 00
		17.....	83 10
		17.....	15,000 00
		18.....	950 00
		21.....	5,000 00
617		22.....	200 00
		23.....	1,056 38
		25.....	308 71
		28.....	66 66
		28.....	91 05
	Oct.	1.....	5,000 00
		5.....	1,500 00
		6.....	90 00
		6.....	205 84
		6.....	71 66
			1,016 66
		9.....	41 32
		12.....	5,000 00
		13.....	363 60
618		6.....	201 66
		14.....	500 00
		16.....	5,000 00
		17.....	300 00
		17.....	3 75
		20.....	455 00
		20.....	268 48
		20.....	311 00
		22.....	116 67
		23.....	33 75
		23.....	20,000 00
		23.....	5,000 00
		23.....	250 00

BLEED THROUGH

1891.					619
	26	123 95			
	26	5,000 00			
	27	10,000 00			
	30	11,000 00			
	31	268 88			
		90 00			
Nov.	3	415 00			
	7	4,400 00			
	9	8,500 00			
	7	475 00			
	7	10,000 00			
	10	1.521 50			
	10	270 65			
	9	11,250 00			620
	10	511 95			
	10	20,000 00			
	10	2,010 00			
Page 17 of Exhibits ends here.					
Total		171,231 59			
Page	1	45,036 68		71,629 53	
	2	14,371 93		96,482 67	
	3	8,759 12		17,095 48	
	4	7,818 22		186,408 88	
	5	12,904 62			
	6	25,610 02			
	7	19,876 47			
	8	37,277 62			
	9	18,162 76			621
	10	9,023 01	Balance	374,978 22	
	11	71,351 76			
	12	62,107 20			
	13	58,128 52			
	14	87,032 45			
	15	91,809 16			
	16	160,593 65			
	17	171,231 59			
		$900,094 78		$900,094 78	

1891.
Nov. 10. To Balance,
374,978 22

POOR COPY

622

Plaintiff's Exhibit No. 40.

Described as being "Telegram J. W. Collins to G. N. O'Brien, October 12, 1891."

Dated, New York 12. Oct. 12, 1891.

G. N. O'Brien, S. D. Western said Gertrude academy of which adamant is now with Donald United States took Babriel adament and credit you and will Harry Bayonet thousand additional to-morrow.

J. W. COLLINS.

623

Plaintiff's Exhibit No. 41.

Described as being "Telegram J. W. Collins to G. N. O'Brien, October 13, 1891."

Dated New York 13. October 13, 1891.

To G. N. O'Brien, S. D. U. S. hampton harried abuse lateral transferred to Jasper banish thence to idol Bargain thousand later not shows bag harris and Jasper afflict harriet equitable included Harried able adjourn here Jasper sent statement.

J. W. COLLINS.

624

Plaintiff's Exhibit No. 42.

Described as being "Telegram J. W. Collins to G. N. O'Brien October 30, 1891."

G. N. O'BRIEN, Cash. S. D. DENVER, Colo. 30.

Expect sell beard & other expect will require twenty days get money likely to abuse then some sixty days write Hellaman Jacient, request extension expected this deal last month altogether will get eighty thousand draw account or less Western same imperial but not by wire.

J. W. COLLINS.

BLEED THROUGH

Plaintiff's Exhibit No. 43.

625

Described as being "Deposit tag W. R. Stebbins Union National Bank, Chicago, March 25, 1891."

Deposited with
The California National Bank
of San Diego. 3/25 1891.

By W. R. Stebbins Union Nat. Chi.
Credit of J. W. Collins.

Check..... 20,000.

626

Plaintiff's Exhibit No. 44.

Described as being "Certificate dated December 29, 1887, authorizing California National Bank to commence business."

TREASURY DEPARTMENT,

OFFICE OF COMPTROLLER OF THE CURRENCY.

WASHINGTON, December 29, 1887.

Whereas, by satisfactory evidence presented to the undersigned, it has been made to appear that "The California National Bank of San Diego," in the City of San Diego, in the County of San Diego, and State of California, has complied with all the provisions of the Statutes of the United States, required to be complied with before an association shall be authorized to commence the business of banking; 627

Now, therefore, I, William L. Trenholm, Comptroller of the Currency, do hereby certify that "The California National Bank of San Diego, in the City of San Diego, in the County of San Diego and State of California, is authorized to commence the

POOR COPY

628 business of banking, as provided in Section fifty-one hundred and sixty-nine of the Revised Statutes of the United States.

In testimony whereof, witness my hand and seal of office this 29th day of December, 1887.

{ Seal of the Comptroller of the Currency. } W. L. TRENHOLM,
Comptroller of the Currency.

No. 3828.

TREASURY DEPARTMENT,
629 OFFICE OF THE COMPTROLLER OF THE CURRENCY, } ss.:

Under the provisions of Section 884 of the Revised Statutes of the United States, I, O. P. Tucker, Deputy and Acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original Certificate of the Comptroller of the Currency authorizing "The California Natl. Bank of San Diego" to commence the business of Banking on December 29, 1887, and of the whole of such original on file and of record in my Office.

In testimony whereof, I have hereto subscribed my name, and caused my seal of office to be affixed to these presents, at the Treasury Department in the
630 City of Washington and District of Columbia, this 8th day of January, A. D., 1894.

O. P. TUCKER,
[SEAL.] Deputy and Acting Comptroller of the Currency.

BLEED THROUGH

Plaintiff's Exhibit No. 45.

631

Described as being "Certificate of organization" of the California National Bank, dated December 16, 1887.

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY, } ss.:

Under the provisions of Section 884 of the Revised Statutes of the United States, I, O. P. Tucker, Deputy and Acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original Organization Certificate of "The California Natl. Bank of San 632
Diego," California, filed in this office December 28, 1887, and of the whole of such original on file and of record in my Office.

In testimony whereof, I have hereunto subscribed my name, and caused my seal of office to be affixed to these presents, at the Treasury Department in the City of Washington and District of Columbia, this 8th day of January, A. D., 1894.

O. P. TUCKER,
[SEAL.] Deputy and Acting Comptroller of the Currency.

633

TREASURY DEPARTMENT.
OFFICE OF THE COMPTROLLER OF THE CURRENCY.
FORM 40. (Ed. 10-20-'92-1,000.) T. B.

INSTRUCTIONS—(Read carefully).

The association will have succession for the period of twenty years from the date of the execution of the Organization Certificate.

The name, etc., of each shareholder, but not necessarily his signature, is required upon the second page. Each person that signs the Articles of Asso-

POOR COPY

634 ciation is also required to sign the Organization Certificate upon the third page.

"The Organization Certificate" must be acknowledged before a judge of a court of record or before a notary public having a seal, and all the shareholders that sign on the third page must make proper acknowledgment on the fourth page.

The "Articles of Association," "Organization Certificate" and "Certificate of Officers and Directors" should be executed in duplicate. One copy of each must be filed in the Office of the Comptroller of the Currency and one in the bank. By carefully following these directions delays will be avoided.

635 ORGANIZATION CERTIFICATE.

We, the undersigned, whose names are specified in article fourth of this Certificate, having associated ourselves for the purpose of organizing an Association for carrying on the business of banking, under the laws of the United States, do make and execute the following Organization Certificate:

FIRST.—The name of the Association shall be "The California National Bank of San Diego."

SECOND.—The said Association shall be located in the City of San Diego, County of San Diego and State of California, where its operations of discount
636 and deposits are to be carried on.

THIRD.—The capital stock of this Association shall be One hundred and Fifty thousand dollars ($150,000), and the same shall be divided into Fifteen hundred shares of one hundred dollars each.

FOURTH.—The name and residence of each of the Shareholders of this Association, with the number of shares held by each, are as follows:

BLEED THROUGH

Name.	Residence.	No. of Shares.
1. John W. Collins	San Diego, Calif.	421
2. David D. Dare	do	420
3. Samuel C. Grigg	do	109
4. William Collier	do	114
5. Theodore R. Gay	do	109
6. John W. Burns	do	109
7. Douglass Gunn	do	109
8. David C. Collier	do	109
		1500

637

FIFTH.—This Certificate is made in order that we may avail ourselves of the advantages of the aforesaid laws of the United States. 638

In witness whereof, we have hereunto set our hands, this Sixteenth day of December, 1887.

1. JOHN W. COLLINS.
2. DAVID D. DARE.
3. SAMUEL C. GREGG.
4. WILLIAM COLLIER.
5. THEODORE R. GAY.
6. JOHN W. BURNS.
7. DOUGLASS GUNN.
8. DAVID C. COLLIER.

STATE OF CALIFORNIA, } ss.:
County of San Diego, }

639

On this, the sixteenth day of December, A. D. 1887, before me, a Notary Public of the State and County aforesaid, personally came John W. Collins, David D. Dare, Samuel C. Gregg, Theodore R. Gay, William Collier, John W. Burns, Douglass Gunn, David C. Collier, to me well known, who severally acknowledged that they executed the foregoing certificate for the purposes therein mentioned.

Witness my hand and seal of office the day and year aforesaid.

THOMAS HIGGINS,
[SEAL OF NOTARY PUBLIC.] Notary Public.

POOR COPY

640 **Plaintiff's Exhibit 46.**

Described as being "Appointment of Frederick N. Pauly as Receiver, dated December 17, 1891."

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY, } ss.:

Under the provisions of Section 884 of the Revised Statutes of the United States, I, Oliver P. Tucker, Deputy and Acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original Commission of Frederick N. Pauly as Receiver of "The Cali-
641 fornia National Bank of San Diego," California, dated December 18, 1891, and of the whole of such original on file and of record in my office.

In testimony whereof, I have hereto subscribed my name, and caused my seal of office to be affixed to these presents, at the Treasury Department in the City of Washington and District of Columbia, this eighth day of January, A. D. 1894.

O. P. TUCKER,
Deputy and Acting Comptroller
[SEAL.] of the Currency.

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642 No. 3828. TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY.

Whereas, W. H. Chamberlain, a National Bank Examiner, duly authorized and directed by me to examine the affairs of "The California National Bank of San Diego," located in the City of San Diego, County of San Diego and State of California, has, after due examination of its affairs, reported to me that the said bank is insolvent;

And whereas, on the 13th day of November, 1891, I became satisfied that the said bank was insolvent and unable to pay its just and legal debts, and ap-

BLEED THROU

pointed the said W. H. Chamberlain to take possession of its assets; 643

Now, therefore, I, Edward S. Lacey, Comptroller of the Currency, in pursuance of the power and authority vested in me by law and under the provisions of Section 1 of an act of Congress entitled "An Act authorizing the appointment of Receivers of National Banks and for other purposes," approved June 30, 1876, do hereby appoint Frederick N. Pauly Receiver of "The California National Bank of San Diego," California, with all the powers, duties and responsibilities given to or imposed upon Receivers under the provisions of the Revised Statutes of the United States which authorize the appointment of a Receiver. 644

In witness whereof, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this eighteenth day of December, A. D. 1891.

(Currency Bureau.) Seal of the Comptroller of the Currency. Treasury Department.

E. S. LACEY,
Comptroller of the Currency.

Plaintiff's Exhibit No. 47.

Described as being "Copy Receiver's bond dated December 29, 1891." 645

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY, } ss.:

Under the provisions of Section 884 of the Revised Statutes of the United States, I, James H. Eckels, Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original Bond of Frederick N. Pauly, Receiver of "The California National Bank of San Diego," California, dated December 29, 1891, and of

POOR COPY

646 the whole of such original on file and of record in my office.

In testimony whereof, I have hereto subscribed my name, and caused my seal of office to be affixed to these presents, at the Treasury Department in the City of Washington and District of Columbia, this eleventh day of January, A. D. 1894.

JAMES H. ECKELS,
[SEAL.] Comptroller of the Currency.

KNOW ALL MEN BY THESE PRESENTS, That I, Frederick N. Pauly of the City of Los Angeles, County of
647 Los Angeles and State of California, as principal, and James F. Wadham and Chas. W. Pauly and Bryant Howard and H. Mabury, A. G. Gassen, Howard M. Kutchin and Geo. W. Marston of the City of San Diego, County of San Diego and State of California, as sureties, are held and firmly bound unto E. S. Lacey, as Comptroller of the Currency, or his successors in said office, in the penal sum of fifty thousand dollars ($50,000), lawful money of the United States, to the payment of which to the said E. S. Lacey as Comptroller aforesaid, or his successors in said office, or assigns, we do hereby, jointly and severally, bind ourselves, our executors and administrators, firmly by these presents.
648 Sealed with our seals, and dated this twenty-ninth day of December, A. D. 1891.

The condition of this obligation is such, that whereas the above-named Frederick N. Pauly has been appointed, by the said Comptroller of the Currency, Receiver of "The California National Bank of San Diego," in the City of San Diego and State of California, in pursuance of the power and authority vested in him by law, and under the provisions of section 1 of an act of Congress entitled "An Act authorizing the appointment of Receivers of National Banks, and for other purposes," approved June 30, 1876:

BLEED THROU

Now, if the said Frederick N. Pauly shall well, truly, and faithfully perform and discharge all and singular the duties imposed on him by law as such Receiver, and shall duly and properly pay over, according to law, any and all moneys that may come into his hands or under his control by virtue of such receivership, then this obligation to be void; otherwise to be and remain in full force and virtue. 649

FREDERICK N. PAULY.	[SEAL.]
JAMES F. WADHAM.	[SEAL.]
CHAS. W. PAULY.	[SEAL.]
BRYANT HOWARD.	[SEAL.]
H. MABURY.	[SEAL.]
A. G. GASSEN.	[SEAL.] 650
HOWARD M. KUTCHIN.	[SEAL.]
GEO. W. MARSTON.	[SEAL.]

Witness:
J. E. WADHAM,
San Diego, Calif.

U. S. OF AMERICA.
County of San Diego, } ss.:
State of California,

JAMES F. WADHAM, one of the sureties named in the preceding bond, being duly sworn, says: That he is a resident and freeholder in the State of California, and is worth the sum of Twelve thousand dollars over and above all his debts and liabilities, and aside from property exempt by law from execution. 651

JAMES F. WADHAM.

Sworn before me this Twenty-ninth day of December, A. D. 1891.

FRED. G. WHITEHEAD,
[SEAL OF NOTARY.] Notary Public.

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652 U. S. OF AMERICA,
County of San Diego, } ss.:
State of California,

CHAS. W. PAULY, one of the sureties named in the preceding bond, being duly sworn, says: That he is a resident and freeholder in the State of California, and is worth the sum of Twelve thousand dollars over and above all his debts and liabilities, and aside from property exempt by law from execution.

CHAS. W. PAULY.

Sworn before me this twenty-ninth }
day of December, A. D. 1891. }

FRED. G. WHITEHEAD,
653 [SEAL OF NOTARY.] Notary Public.

I, Geo. Puterbaugh, do hereby certify that the sureties to the preceding bond are amply sufficient.

GEO. PUTERBAUGH,
[SEAL OF CORUT.] Judge of the Superior Court.

U. S. OF AMERICA,
County of San Diego, } ss.
State of California,

H. MABURY, one of the sureties named in the preceding bond, being duly sworn, says: That he is a resident and a freeholder in the State of California, and is worth the sum of Twenty thousand dollars
654 over and above all his debts and liabilities, and aside from property exempt by law from execution.

H. MABURY.

Sworn before me this twenty-ninth }
day of December, A. D. 1891. }

FRED. G. WHITEHEAD,
[SEAL OF NOTARY.] Notary Public.

I, GEO. PUTERBAUGH, do hereby certify that the sureties to the preceding bond are amply sufficient.

GEO. PUTERBAUGH,
[SEAL OF COURT.] Judge of the Superior Court.

BLEED THROUGH

U. S. OF AMERICA,
County of San Diego,
State of California.

655

BRYANT HOWARD, one of the sureties named in the preceding bond, being duly sworn, says: That he is a resident and freeholder in the State of California and is worth the sum of Twenty thousand dollars over and above all his debts and liabilities, and aside from property exempt by law from execution.

BRYANT HOWARD.

Sworn before me this Twenty-ninth day of December, A. D. 1891.

FRED G. WHITEHEAD,
[SEAL OF NOTARY.] Notary Public.

656

U. S. OF AMERICA,
County of San Diego,
State of California.

GEO. W. MARSTON, one of the sureties named in the preceding bond, being duly sworn, says: That he is a resident and freeholder in the State of California, and is worth the sum of twelve thousand dollars over and above all his debts and liabilities, and aside from property exempt by law from execution.

GEO. W. MARSTON.

Sworn before me this Twenty-ninth day of December, A. D. 1891.

FRED G. WHITEHEAD,
[SEAL OF NOTARY.] Notary Public.

657

I, GEO. PUTERBAUGH, do hereby certify that the sureties to the preceding bond are amply sufficient.

GEO. PUTERBAUGH,
[SEAL OF COURT.] Judge of the Superior Court.

U. S. OF AMERICA,
County of San Diego,
State of California.

A. G. GASSEN, one of the sureties named in the preceding bond, being duly sworn, says: That he is a resident and freeholder in the State of California and is

POOR COPY

worth the sum of Twelve thousand dollars over and above all his debts and liabilities, and aside from property exempt by law from execution.

A. G. GASSEN.

Sworn before me this Twenty-ninth day of December, A. D. 1891.

FRED. G. WHITEHEAD,
Notary Public.

[SEAL OF NOTARY.]

U. S. OF AMERICA,
County of San Diego,
State of California.

HOWARD M. KUTCHIN, one of the sureties in the preceding bond, being duly sworn, says: That he is a resident and freeholder in the State of California, and is worth the sum of Twelve thousand dollars over and above all his debts and liabilities, and aside from property exempt by law from execution.

HOWARD M. KUTCHIN.

Sworn before me this Twenty-ninth day of December, A. D. 1891.

FRED. G. WHITEHEAD,
Notary Public.

[SEAL OF NOTARY.]

I, GEO. PUTERBAUGH, do hereby certify that the sureties to the preceding bond are amply sufficient.

GEO. PUTERBAUGH,
Judge of the Superior Court.

[SEAL OF COURT.]

STATE OF CALIFORNIA
County of San Diego, } ss.:

I, W. M. GASSOWAY, Clerk of the County of San Diego, and *ex officio* Clerk of the Superior Court in and for said County, do hereby certify that said Court is a Court of Record.

That Fred G. Whitehead whose name is subscribed to the certificate of the proof of acknowledgment of the annexed instrument, was at the time of taking the same a Notary Public in and for said County, duly commissioned and sworn and qualified

BLEED THROUGH

to act as such; that as such Notary Public he was at 661
the time of taking such acknowledgment duly authorized by the laws of the State of California to take the acknowledgments and proofs of deeds or conveyances of lands, tenements or hereditaments in said State of California; that I am well acquainted with the handwriting of said Fred G. Whitehead and verily believe that his signature to the same is genuine, and that the same has been executed according to the laws of the State of California.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at San Diego in said County of San Diego, this 29th day of December, A. D. 1891.

W. M. GASSOWAY, 662
[SEAL OF COURT.] County Clerk and *ex-officio* Clerk of the Superior Court of said County.

Copy of the account of J. W. Collins as contained in Ledgers 4 and 5 of the California National Bank of San Diego.

Date.	Checks in Detail.	Total Checks.	Deposits.
1890.			
Nov. 1.	Balance Ledger 3; Page 131.....	138,200 00	157,052 21
1.	10,000—2.10—59.05—65—13....	10,139 15	
3.	.85—3—100.....	103 85	663
5.	225—21—5—15,000	15,251 00	242 50 15,000 00 500 00
6.	....	480 39	
7.	4.70—100—4.42	109 12	
8.	3—8	11 00	
10.	5—206 66—10—24.75—1087. ...	1,333 41	
11.	20—40	60 00	
12.	4.75—63.56	68 31	
13.	....	25 00	
17.	33.25—40	73 25	
19.	....	15 75	
20.	....	2 90	
21.	793.05—325	1,118 05	

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	Date. 1890.	Checks in Detail.	Total Checks.	Deposits.
664	22.	1,000—200—250	10,450 00	
	24.	79.62—8.75	88 37	
	25.	Balance		4,734 84
		102 Checks Ret'd	177,529 55	177,529 55
	Nov. 25.	Balance	4,734 84	
	26.		24 00	1,000 00
	28.		5 00	
	Dec. 1.	25—5. Waterman	30 00	501 50
				50 00
	2.	3—8—6—14.75	31 75	
	3.		25 00	
	4.	55—10.20	65 20	
	5.	4,000— .15	4,000 15	
	6.	10—10	20 00	
665	8.	3—25—224.20—6.45—86.50	345 15	15,000 00
	10.	Taylor Div		330 05
	11.	50—13.35—1—150.70	205 05	10 40
	12.	1—100	101 00	
	13.	50—1,000. Stebbins	10,050 00	10,000 00
	15.	R. W. Waterman	5 00	350 00
	16.		5 00	
	17.		1 00	
	18.	1—400	401 00	
	19.	10—30	40 00	
	22.	3,500—12,000 c/o Son Cal. Nat	15,500 00	12,000 00
	23.	8,813.59—20.75—20—10	8,864 34	
	24.		278 36	
	26.	C/o Ken Mills Deal	5 00	54 80
	27.		25 92	
	29.	28.88—25—1,000	1,053 88	
	30.	Sal		1,000 00
666	31.	15,000—4.46—62.64	15,067 10	
	1891.			
	Jan. 2.	290—.60—235.25—2.85—5. Bal. Waterman Clif. McL. & Y	533 70	150 50
	Jan. 2.	290—60—235.25—2.85—5. Bal. Waterman	533 70	150 00
	5.	5—41.73	46 73	
	6.	17.25—65—4—1,001	1,087 25	
	7.		1 00	
	9.	200—10	210 00	
	12.	1/2 S. Sacks No. 4		312 50
		Div. No. 4		1,345 00
	14.		5 00	
	15.		120 00	
	16.	Div. Mtg. Co		125 00
	19.	Capron chg. D. & S		11,087 51

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Date.	Checks in Detail.	Total Checks.	Deposits.	667
1891.				
20.	.....	21 00		
25.	.....	15 09		
22.	D. D. D. OD 256.66.....	62,933 42	300 00	
	.....		62,666 76	
29.	60—25—2	87 00		
30.	.....		3,483 18	
1892.				
2.	366.66—100—150—10.75.....	627 41		
	.....	63,647 83	66,149 94	
4.	Mtg. Co.		50 00	
7.	14.10—300	314 10	698 50	
	.....		125 00	
7.	.....		1,000 00	
10.	.....		58 75	
11.	314—70	384 00		
12.	.....	106 40		
14.	D. & C.....		250 00	668
16.	10—20—3.50—1,000.....	1,033 50		
17.	13.45—5,800—100.....	5,913 45		
20.	.....	1,000 00	1,000 00	
21.	.....		12,000 00	
24.	.....	30 00		
26.	.....	120 00		
1893.				
2.	5.20—1,000.....	1,005 20		
4.	100—40	140 00		
5.	.....	25 00		
6.	.....	1,000 00	1,875 00	
7.	S N. Waterman	218 55	250 00 1,534 98	
9.	.....		1,000 00	
10.	9—27	36 00		
11.	.....	2,500 00		
12.	16—129.55—50	195 50	20,456 21	669
13.	5—5	10 00		
14.	100—750—68 90—150	1,068 90		
17.	.....	100 00		
18.	7.50—10,000	10,007 50	10,000 00	
19.	.....	762 32	762 32	
21.	.....	1 50		
	.... 27,590 90	89,619 80	119,210 70	
24.	....	375 00		
25.	Union Nat. Chigo. Nat. Park..... Stebbins		25,000 00 20,000 00	
26.	.....	5 00		
27.	25,000 — 5,555.60 — 1,214.84 — 4,760.65—12,000—500—6,000—4,170—190.....	59,391 09		
30.	.....		1,230 00	

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	Date.	Checks in Detail.	Total Checks.	Deposits.
670	1894.			
	2.	14.70—1.25—357.78	373 73	
	3.	10—31.25	41 25	
	4.		100 00	
	6.		60 00	
	7.	40—10,776.48—513.70—47	11,377 13	
	8.	1,000—5—61.50—18.50	1,085 00	
	9.		120 00	12,500 00
	10.		40 00	
	11.			500 00
	13.			3,750 00
	14.		15 55	
	16.			4,500 00
	17.		76 38	
	18.	1,500—85	1,585 00	
	21.			20,000 00
	22.		219 87	
671	25.	100—27.70	127 70	
	27.	500—2,000.00—5	2,505 00	
	28.		414 00	
	1895.			
	2.	100—5.50—440	545 50	40,000 00
	7.		6 70	383 00
	8.	1,666.66—52	1,718 66	16,000 00
	9.		5 00	
	12.		7 40	
	13.		1,005 15	1,250 00
	14.	4—8,500	8,504 00	
			179,323 96	262,323 70
		Page 121.		
	May 16.		5 00	
	18.	84.59—1,000	1,084 59	
	19.		566 50	
672	20.	1,260—200	1,460 00	
	22.		12 00	
	23.	60—583.33	643 33	
	25.	350—60—72.50	482 50	
	26.	1,610—50	1,660 00	
	1886.			
	1.			5,830 00
	4.		306 67	
	6.			20,000 00
	10.	173.08—400	573 08	
	13.		20,000 00	
	16.	25.40—150	175 40	
	20.	H. Wagner		550 00
	27.	25—200—60—50 000	50,285 00	
	29.	1,000—2,000—1,000	4,000 00	
	30.	4—50	54 00	

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Date. 1887.	Checks in Detail.	Total Checks.	Deposits	673
1.	.....	25 00		
2.	.....	18 00		
3.	100—102.41—2,551.67.....	2,854 08		
6.	.....	122 50		
7.	20,000—5—75.89.....	20,080 89		
8.	.....	151 11		
9.	4.85—10.....	14 85		
11.	7,500—60—100	7,660 00		
15.	M. L. I. Co. Div. No. 5.....		125 00	
20.	.....	140 00		
21.	.....	40 00		
23.	50,000—80.....	50,080 00	35,000 00	
			39,145 34	
24.	318—50.....	368 00		
25.	.....	10,840 81		
27.	60—842.72—50.....	952 72		
29.	.....	2 00		674
30.	50—195.20.....	245 20		
31.	S. Gate Building.....		264 00	
31.	Spreckels B		20,000 00	
31.	S. B. St. La.....		10,000 00	
	L. 5 Page 134.....	334,227 19	413,288 04	
Aug. 1.	.....	1,500 00		
3.	.....		839 13	
4.	.....		1,385 00	
5.	.....	5,880 00		
6.	.....	1 00		
7.	.....	98 05		
10.	21.25—67.17—100. Graw.....	188 12	2,000 00	
11.	412.50—6—50—760—.50.....	1,229 00		
12.	10,000—236.65—90. W. F. & Co.		777 08	
	H. P. P....	10,326 65	412 50	
17.	5—1250.....	1,255 00		
18.	489.17—125.....	614 17	25 00	
			500 00	675
18.	C. H. Hill.			
20.	.....	5 00		
22.	5—13,949.99—2,016.57.....	15,971 56		
24.	35—350.....	385 00		
26.	.....		20 50	
27.	.....	16 00		
31.	S. B H	513 33	10,000 00	
Sep. 1.	6,080—16,500—118.50. Sit Helbord.....	22,698 50	625 00	
2.	56.25—5—4,000.....	4,061 25		
3.	.....	50 00		
4.	.....	1,547 34		
5.	136—30	166 00		
8.	.....	218 55	39,475 00	

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	Date. 1877.	Checks in Detail.	Total Checks.	Deposits.
676	10.	.....		200 00
	11.	416.67—15,000.....	15,416 67	
	12.	.....	750 00	3,000 00
	14.	3—1,134.27.....	1,137 27	
	17.	12—83.10.....	95 10	
	19.	15,000—950.....	15,950 00	
	21.	.....	5,000 00	
	22.	.....	200 00	12,250 00
	23.	.....	1,056 33	4,500 00
	25.	.....	308 71	
	28.	66.66—91.05.....	157 71	
	Oct. 1.	.....	5,000 00	54 00
	3.	.....		3,000 00
	5.	.....	1,500 00	
	6.	90—205.84—71.66.....	367 50	
	7.	.....		8,000 00
677	8.	.....	1,016 66	
	9.	.....	41 32	
	12.	.....	5,000 00	5,000 00
	13.	Westn Natl.....		20,000 00
		U. S. Nat., N. Y.....	363 60	24,500 00
	14.	201.66—500	701 66	500 00
	16.	.....	5,000 00	
	17.	300—3.75—Add West Nat.....	303 75	133 79
	20.	455—268.48—311.....	1,034 43	180 00
	22.	.....	116 67	
	23.	33.75—20,000—5,000—250	25,283 75	
	24.	Bartlett Stk.....		2,082 50
	26.	123.95—5,000.....	5,123 95	
	27.	.....	10,000 00	
	30.	.....	11,000 00	
	31.	1st Chic. West. N. Y.....	268 88	20,000 00
	Nov. 3.	Metcalf.....	90 00	8 53
	4.	.....	425 00	
678	6.	C. S. Bank		8,250 00
	7.	.....	4,400 00	
	9.	8,500—475—10,000.....	18,975 00	
			537,036 07	583,511 07
	10.	1,521.50—270.65—11,250—511.95 —2,010—20,000.....	35,564 10	10 00
	11.	.....		500 00
	1892.			
	Jan. 14.	.....	350 00	
	2.	.....	19,500 00	

BLEED THROUGH

Defendant's Exhibit A.

679

Being described as proof of claim Western National Bank of New York.

IN THE MATTER

OF

The Claim of THE WESTERN NATIONAL BANK OF THE CITY OF NEW YORK against the CALIFORNIA NATIONAL BANK, SAN DIEGO, CALIFORNIA.

680

STATE OF NEW YORK, City and County of New York, } ss.:

HENRY A. SMITH, being duly sworn, says: That he is the cashier of the Western National Bank of the City of New York and as such cashier has knowledge of the transactions between said bank and the California National Bank, lately doing business at San Diego, in the State of California.

I.—That on the 2d day of November, 1892, the Western National Bank sent to the California National Bank for collection the note for $10,000 made by W. O. Havermale, which became due November 11th, 1891, which note, as deponent is informed and believes, was collected by the California National Bank, which holds the proceeds thereof as agent and in trust for the Western National Bank, together with the accrued interest on said note amounting on January 23d, 1892, to the sum of $121.61. The total sum so held by the California National Bank as agent or trustee of the Western National Bank is ten thousand one hundred and twenty-one and $\frac{61}{100}$ dol-

681

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682 lars; no part of said sum has been paid or satisfied and there are no set-offs or counterclaims thereto, to the knowledge or belief of deponent, and said sum is subject to no deductions whatever, but is the property of the Western National Bank and is payable in full.

II.—That there is due to the Western National Bank from the California National Bank the further sum of twenty-one hundred and seventy-three and $\frac{59}{100}$ dollars, being the amount paid out by the Western National Bank on account of drafts and checks drawn by the California National Bank in excess of the amount deposited in the Western National Bank
683 to the credit of the California National Bank, together with interest on said sum from the 9th day of January, 1892, amounting in all to the sum of twenty-one hundred and ninety-three and $\frac{51}{100}$ Dollars; no part of said sum has been paid or satisfied; and there are no off-sets or counterclaims thereto to the knowledge or belief of deponent.

III.—That there is due and owing to the Western National Bank from the California National Bank the further sum of seventy-five hundred dollars on account of certificate of deposit No. 6800, issued by the California National Bank and of which the Western National Bank is the holder and owner; no
684 part of said sum has been paid or satisfied and there are no set-offs or counterclaims thereto, to the knowledge or belief of deponent.

IV.—That on or about October 12th, 1891, in consideration of a time loan of twenty thousand dollars made by the Western National Bank to the California National Bank, the California National Bank made its certain promissory note in writing whereby it promised to pay to said Western National Bank ninety days after date the sum of twenty thousand dollars with interest; that no part of said sum has been paid except the sum of thirty-

BLEED THROUG

two hundred and seventeen and $\frac{50}{100}$ Dollars; there is 685
now due and owing to the Western National Bank from the California National Bank on account of said note the sum of sixteen thousand eight hundred and eighty-three and $\frac{18}{100}$ Dollars, as appears more fully in the statement annexed hereto and marked "Exhibit B"; no part of said sum has been paid or satisfied and there are no set-offs or counterclaims hereto to the knowledge or belief of deponent, except as hereinafter stated.

Deponent further says that of the bills receivable, aggregating thirty-six thousand two hundred and fifty dollars, deposited with the Western National Bank of the City of New York as collateral security for the payment of the above mentioned note of 686
twenty thousand dollars, there has been collected the sum of one thousand dollars on a note of George W. Marston, due December 3, 1891, for one thousand dollars, and the sum of twenty-two hundred and seventeen and $\frac{50}{100}$ dollars on a note of William Collier and William C. Graham, due November 28, 1891, for twenty-two hundred and fifty dollars, being the amount of said note less the cost of collecting the same, which said amounts have been duly placed to the credit of the California National Bank on account of said loan, as will appear from the annexed statement.

That the balance of said collateral security held by the Western National Bank consists of the following 687
notes:

D. D. Dare, due January 1, 1892, for $5,500.

L. B. Howard, due December 20, 1891, for $12,500.

Janell Portland Cement Company, due November 17, 1891, for $5,000.

Deponent further says that said notes and each of them was duly presented for payment at the time and place they fell due, and that payment thereof was duly demanded, which was refused, whereupon said notes were duly protested for such non-pay-

POOR COPY

688 ment, and that said notes and each of them are now worthless and of no value whatsoever, as deponent verily believes; that the note of William O. Havermale for $10,000 due November 11, 1891, as deponent is informed and believes, has been collected by the California National Bank, the proceeds of which the California National Bank holds as agent or trustee for the Western National Bank as hereinabove set forth.

Deponent further says that the total amount due and owing to the Western National Bank from the California National Bank is thirty-six thousand, six hundred and ninety-eight and $\frac{78}{100}$ dollars, as more fully set forth in the statement and annexed hereto
689 and marked Exhibit "C"; of said amount the sum of ten thousand one hundred and twenty-one and $\frac{61}{100}$ dollars is the property of the Western National Bank and is subject to no deductions whatever, but is payable in full.

H. A. SMITH, C.

Sworn to before me this 5th day of March, 1892.

CHAS. L. ROBINSON,
[SEAL.] Notary Public,
Kings Co.
Certificate filed in N. Y. Co.

Form 4.

690 STATE OF NEW YORK, City and County of New York, } ss.:

I, WILLIAM J. MCKENNA, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County, being a Court of Record, do hereby certify that Chas. L. Robinson has filed in the Clerk's office of the County of New York, a certified copy of his appointment as Notary Public for the County of Kings, with his autograph signature, and was, at the time of taking the annexed deposition, duly authorized to take the same. And that I am well acquainted with the handwriting

BLEED THROUG

of said Notary Public and verily believe that the 691
signature to the annexed certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County the 7th day of March, 1892.

WM. J. MCKENNA,
Clerk.

[SEAL.]

"A"

$20,000 NEW YORK, October 12th, 1891.

Ninety days after date, for value received, we promise to pay to J. W. Collins or order at the Western National Bank of the City of New York, 692
Twenty thousand dollars, with interest at the rate of per cent. per annum said interest being payable having deposited with said bank, as collateral security for payment of this note, reference being had to the endorsement hereon and in accordance with its terms, the following property, viz:

Bills receivable aggregating $36,250, the market value of which is now $ with a further right to call for additional security, in case there should be a decline in the market value thereof, and on failure to respond according to the tenor of this obligation, said obligation shall be deemed to be due and payable without demand or notice, with full power and authority to said bank to sell and assign 693
and deliver the whole of the above mentioned security or any part thereof, or any substitutes therefor or any additions thereto, at any broker's board or at public or private sale, at the option of said bank or its President, or its cashier, or its or their assigns, on the non-performance of this promise, or the non-payment of any of the liabilities mentioned above at any time or times thereafter without demand, advertisement or notice; and after deducting all expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales, so to be

POOR COPY

694 made, to pay any, either or all of the above mentioned liabilities, as said bank or its President or its cashier, or its or their assigns shall deem proper, returning the overplus to the undersigned.

CALIFORNIA NATIONAL BANK OF SAN DIEGO.
per J. W. COLLINS,
President.

Endorsed: Pay to the order of the Western National Bank and further agree to the terms and conditions of the collateral obligation entered into by the maker of the within note and waive notice, demand and advertisement and notice of any substitution of securities and for full value received hereby guarantee the performance of the promise entered into by the maker of said note.

695

B.

WESTERN NATIONAL BANK.

NEW YORK, Febry. 18, 1892.

CALIFORNIA NATIONAL BANK,
San Diego, Cal.

Dear Sirs:

There is due us for interest on your time loan due Jan. 13, 1892, to date as follows, viz.:

696

Date		For days at	per cent. Dollars		cts.
$20,000	Oct. 12	91			
(PP) 1,000	Dec. 15	91	Geo. W. Marston	Due Dec. 3. 91.	
19,000				For $1000	
(PP) 2,217.50	Jan. 9	92	Wm. Collier Margt. Co.		
			Graham due Nov. 28. 91 for	2250.	
16,782.50	86	6		100.69	
				16782.50	
			Total amt. due Feb. 18–92	16883.19	

Yours truly,
H. A. SMITH,
Cashier.

BLEED THROUGH

Exhibit "C."

697

STATEMENT OF AMOUNT DUE AND OWING FROM THE CALIFORNIA NATIONAL BANK TO THE WESTERN NATIONAL BANK OF THE CITY OF NEW YORK:

There are two classes of claims, as follows, viz:

I. The California National Bank holds as trustee or agent for the Western National Bank the proceeds of the note of W. O. Havermale, due November 11th, 1891, together with interest thereon, subject to no deduction whatever and payable in full, being the property of the Western National Bank $10,121 67 698

II. Debts due and owing from the California National Bank to the Western National Bank:

Balance on the loan	$16,782 50	
Overdraft in account	2,173 59	
Certificate of deposit No. 6800	7,500 00	
Interest on the above amounts to January 23d, 1892	121 02	$26,577 11
		$36,698 78

699

Allowed

Balance on note	$16,782 50
Overdraft	2,171 14
	$18,953 64

No. 1042.

Note of L. B. Howard returned with this proof of claim was surrendered under order of court to L. B. Howard.

POOR COPY

700 **Defendant's Exhibit "B."**

Being described as letter F. N. Pauly to Western National Bank.

SAN DIEGO, CAL., March 28th, 1892.

WESTERN NATIONAL BANK,
New York, N. Y.

Dear Sirs:—

The claim herewith enclosed, in your favor, was received from an attorney of New York City and his letter, having been filed under his name, we are
701 not able to find now, his name being forgotten; hence we send the paper direct to you.

The U. S. Attorney advises me that these claims cannot be allowed to be proven against the California National Bank, the over-draft being the only item that I so far see can be admitted to proof. The Havermale note is rejected on account of irregularities, under the advice of my attorney. If the California National Bank is indebted to the Western National Bank, so far as I understand the matter, it would be on the balance due upon the note that you say was given to the California National Bank, and this over draft. I am not prepared to admit, however, that the note that you allude to, as a note of
702 the California National Bank to the Western National Bank is a *bona fide* transaction, on the contrary I am advised to reject the claim. The claim under certificate of deposit No. 6800 for $7,500 is also rejected.

Respectfully yours,
(Sgd.) FREDERICK N. PAULY,
Receiver.

BLEED THROUGH

703

Defendant's Exhibit "C."

Described as being Application of Mr. O'Brien for bond.

Application No. 104,056. [Vignette.] Agency.....
Amount, $.....Rate, %. ...
Bond No. 85,565. Form A. A. I. R. No.....Premium, $....
80,82
Date.....18.. From July 1/91, to July 1/92.
Referred to the President with Power by Executive Committee Aug. 8th, 1891.

Per Secretary,
by D. B. S.

704

APPLICATION FOR BOND

OF THE

AMERICAN SURETY COMPANY

OF NEW YORK, 160 BROADWAY.

Cash Capital, $1,000,000.

The business of the American Surety Company is devoted exclusively to Guaranteeing the Fidelity of persons holding positions of Pecuniary Trust, and of acting as Surety on Bonds and undertakings required in the Courts.

705

PLEASE ANSWER ALL QUESTIONS IN THIS APPLICATION.

The undersigned hereby makes application for a Bond of Indemnity, to date from July 1st, 1891, for Fifteen thousand $15,000 Dollars ($15,000) in favor of California National Bank, San Diego, California, as security to them covering the Applicant's position in their service as Cashier of Calif. State Bank at San Diego, in the State of California, and hereby affirms that in the following declarations made and

POOR COPY

706 answers given, he states the truth without reservation of any kind whatsoever.

1. Is the above named location a Post Office? If not give name of nearest Post Office. Yes.

2. What is your full name? George Horton O'Brien. Age, 24 years.

3. Where and when were you born? Kewanee, Henry County, Ill., Oct. 19, 1867.

4. How long did you reside in your native place? About fifteen years.

5. Are you married or single? If married, state how many children you have. Unmarried. If wife is alive, give her name and address,
707 if a widower, please so state.

6. If others beside wife and children are dependent on you for support, give name and particulars. Father, James O'Brien; sister, M. Carrie O'Brien.

7. How long have you been engaged with your present employer? Three years and a couple of months.

How long in position for which bond is now required? Six months.

8. What is the nature of the business and where located? Banking business at San Diego, California.

708 9. What are the duties required of you in this position? Bank correspondence and supervision of the several departments.

10. What salary are you receiving? $1,800 per annum or thereabouts.

11. If any other allowances will be made you? None. If salary is subject to any deduction, state particulars. None.

12. Have you any income from sources other than that of the salary above named? If so how much (about) and from what source is it derived? None worth mentioning.

BLEED THROUGH

13. Are you engaged in any other business which you will carry on during this employment? If so, describe its nature and if a partnership give name of partner. None. 709

14. Are you engaged in, or do you from time to time engage in, purely speculative transactions, such as stocks, grain, oil, or real estate? If so give particulars. No.

15. Have you ever been bankrupt or insolvent, or did you ever compound with your creditors? If so, state whether now discharged, and in what manner. No.

16. Have you ever been in arrears or default in your present or any previous employment? If so, please give full particulars. No. 710

17. When and by whom were your accounts last examined and were they found correct? National Bank Examiner. Yes.

18. Have you ever been discharged from any situation? If so, state particulars. No.

19. Give particulars and amount of any debt you owe or liability you are under; also state whether you are endorser or surety for any one, and to what extent? Am on few small bonds and am security on one or two notes of no consequence. I owe about $2,000 on my house.

20. Have you hitherto given security? If so, please give names and addresses of your bondsmen, and state why discontinued. No, and am not now required to do so. 711

21. Do you now furnish security in addition to that herein applied for? If so, how, and to what extent? No.

22. Have you ever applied to any other source for a bond? If so, state when and to whom, and, whether successful. No.

NOTE.—If the required information is not given in response to the foregoing questions it will be necessary to return this blank to you for completion. The answers will be treated as strictly confidential.

POOR COPY

712 23. What was your occupation immediately preceding your present position, and for what reason did you leave the same? Real Estate business, discontinued to better my condition.

24. Please fill in the following blanks, giving dates of your employment and names of employers during the past ten years.

From What Date.	To What Date.	Employed as	At Address	In Service of Name of Employer or Corporation.	Under Name of Manager, Superintendent or Head of Department—for reference.
713					
1884.	1885.	Bookkeeper.	Tiffin, Ohio.	O'Brien Bros. Mfg. Co.	James O'Brien, Prest.
1885.	1887.	Bookkeeper and shorthand.	do.	B & O. Ry. Co.	E. M. Davis, D. F. A.
1887.	1888.	do	San Diego, Cal.	W. H. Holabird Co.	W. H. Holabird.

Left School Graduate of University of Notre Dame, Ind., in Summer of 1884. In active business only 7 years.

25. Give reasons in full for leaving former employers. My wish to go West.

26. If your life is insured, state for what amount, for how long a time, and in what Company. $5,000, Equitable, 20 years from '88; Mich. Mutual, Detroit, $2,500, 40 years '87; $5,000, U. S. Mutual Accident, 1 year; $1,000, C. K. A., Chattanooga Life.
714

27. Please give particulars respecting parents and nearest relatives, if living, as follows:

Name of Father, James O'Brien. Address, San Diego, Calif. Business, Retired, Old age.
Name of Mother, not living.
Name of nearest male relative on Father's side, Thos. O'Brien. Address, Morico, Ills.
Name of nearest male relative on Mother's side, Myles Seery. Address, Pineville, Ills.

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10987

28. The applicant is requested to give below the names and addresses of as many persons as possible for Referees, *not less than five*, who are not related to him. ☞ In no case, however, must a Referee be named who is one of the firm or an officer of the Bank or Company in whose favor the bond herein applied for is to be made.

715

	Name.	Occupation.	Post Office Address. No. of Street, if in a City.
1	Elias Lyman....	Banker.	Kewanee, Ills.
2	Thos. A. Nognan.	G. M., Big 4 R. R.	Chicago, Ills., 12 Pacific Ave.
3	Jno. Ellis	Banker.	Kewanee, Ills.
4	E. M. Davis	D. T. H., B. & O.	Tiffin, Ohio.
5	L. W. Tioary...	Retired.	Pasadena, Calif.
6			
7			
8			

716

IN CONSIDERATION of the American Surety Company agreeing or consenting to issue on my behalf, a certain bond or obligation upon the statements contained in this application, guaranteeing the employer, herein named, against any loss or damages, arising out of any act of default, miscarriage or neglect of mine, I DO HEREBY COVENANT, PROMISE AND AGREE and bind myself, my heirs, executors, administrators, and assigns to indemnify and at all times keep amply indemnified and save harmless, the said Surety Company of, from and against any and all loss, costs, damages, charges and expense whatsoever which the said Company shall or may for any cause, at any time, sustain, or incur, by reason or in consequence of

717

Note.—If the required information is not given in response to the foregoing questions it will be necessary to return this blank to you for completion. The answers will be treated as strictly confidential.

POOR COPY

718 said Company having entered into and executed said Bond or obligation.

AND I DO ALSO expressly agree to indemnify and save harmless the said Surety Company from all loss or damage, by reason of its having entered into and executed any other bond or obligation on my behalf, required by me, to be given in the service of the said employer, or assigns, whether induced by representations disclosed in this application, or in any subsequent application submitted for such guarantee, or upon any statements or representations made by me, or by any person duly authorized and acting in my behalf, hereby intending to become responsible to said Company for any
719 loss by it sustained by reason of having entered into any obligation, bond or guarantee issued for me or on my account.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my seal this 10th day of July, 1891.

(Sgd.) GEORGE O'BRIEN [SEAL].

Signed, sealed and delivered }
in the presence of— }

(Sgd.) J. E. D. KILLEN.

Post-office address in full, San Diego, Calif.

If this application is declined the Company re-
720 serves the right to withhold the reason therefor, if deemed necessary, as all information relative thereto is regarded as confidential.

BLEED THROUGH

EMPLOYER'S CERTIFICATE. 721

I have read the foregoing declarations and answers made by Geo. N. O'Brien and believe them to be true.

He has been in the employ of this Bank during three (3) years; and to the best of my knowledge has always performed his duties in a faithful and satisfactory manner.

His accounts were last examined on the 28th day of March, 1891, and found correct in every respect. He is not to my knowledge, at present, in arrears or in default.

I know nothing of his habits or antecedents affecting his title to general confidence, or why the bond he applies for should not be granted to him. 722

Amount required, $15,000. Bond to date from July 1, 1891.

Dated at San Diego, the 10th day of July, 1891.

(Signature) (Sgd.) J. W. COLLINS,
Pt. Cal. Nat. Bk.

On behalf of .....

NOTE.—If applicant is newly employed, write here "New Employee," and give name and address of person by whom he was introduced to you.

FOR THE EXCLUSIVE USE OF THE HOME OFFICE.

References Mailed July 20, 1891. References Duplicated.....
Additional References Requested, 8/11/91. Received and Mailed Aug. 25/91.
E. G. S. Mailed to Employer ..... Returned Completed.....
Wrote..... Agency in re.....
Wrote Employer.....
Wrote Applicant .....
.....
.....
.....

FOSTER & GWYN,
Agents for Southern California,
San Diego.

NOTE.—If the required information is not given in response to the foregoing questions it will be necessary to return this blank to you for completion. The answers will be treated as strictly confidential. 723

Jul. 20, 1891.

POOR COPY

724 **Defendant's Exhibit "D"**

Described as being Application of Mr. Collins for bond.

Refd. to Prest. with power, Aug. 5/91.
Approved by " Aug. 6/91.
Application No. 104,055. [Vignette.] Agency, San Diego, Cal.
Amount, $.....Rate, %....
Bond No. 85,495. Form A. A. I. R. No....Premium, $....
80/82
Date.....18 From July 1/91, to July 1/92.

APPLICATION FOR BOND

725 OF THE

AMERICAN SURETY COMPANY

OF NEW YORK, 160 BROADWAY.

Cash Capital, $1,000,000.

The business of the American Surety Company is devoted exclusively to Guaranteeing the Fidelity of persons holding positions of Pecuniary Trust, and of acting as Surety on Bonds and undertakings required in the Courts.

726 PLEASE ANSWER ALL QUESTIONS IN THIS APPLICATION.

The undersigned hereby makes application for a Bond of Indemnity, to date from July 1st, 1891, for Twenty-five thousand Dollars ($25,000) in favor of California National Bank, San Diego, California, as security to them covering the Applicant's position in their service as President, at San Diego, in the State of California, City of San Diego, and hereby affirms that in the following declarations made and answers given, he states the truth without reservation of any kind whatsoever.

BLEED THROU

1. Is the above named location a Post Office? If not give the name of nearest Post Office. Yes. 727
2. What is your full name? John William Collins. Age, 42 years.
3. Where and when were you born? Shrewsbury P. O., York County, Pa. 18
4. How long did you reside in your native place? About 20 years.
5. Are you married or single? If married, state how many children you have. Single, widower. If wife is alive, give name and address, if a widow, please so state. My entire family was drowned Sep. 1/90, consisting of wife and two children. 728
6. If others besides wife and children are dependent on you for support, give name and particulars. No one dependent upon me for support.
7. How long have you been engaged with your present employer? 3½ years.
   How long in position for which bond is required? 3½ year. (Cashier & Prest.).
8. What is the nature of the business and where located? Banking; San Diego, Cal.
9. What are the duties required of you in this position? The handling of money occasionally, part of correspondence of the Bank and such as any Bank might require of its President. 729
10. What salary are you receiving? Pay, $3,000; from July 1, 1891.
11. If any other allowance will be made you? No. If salary is subject to any deduction, state particulars. No.
12. Have you any income from sources other than that of the salary above named? If so how much (about) and from what source is it derived? Yes; as stockholder in several banks and other investments aggregating about $15,000 to $20,000.

H POOR COPY

730 13. Are you engaged in any other business which you will carry on during this employment? If so, describe its nature and if a partnership give name of partner. Store at Helena, Montana; Brunell & Co., dry goods, &c. Partner's name, Henry E. Brunell.

14. Are you engaged in, or do you from time to time engage in, purely speculative transactions, such as stocks, grain, oil, or real estate? If so give particulars. Sometimes buy real estate; never touched anything through Stock Exchange, such as enumerated above and others, but local or bank stocks.

731 15. Have you ever been bankrupt or insolvent, or did you ever compound with your creditors? If so, state whether now discharged, and in what manner. No, never; Insolvent proceedings nor compromises or other scrapes of the kind.

16. Have you ever been in arrears or default in your present or any previous employment? If so, please give full particulars. No.

17. When and by whom were your accounts last examined and were they found correct? Nat'l Bank Examiner's usually once a year. Yes.

18. Have you ever been discharged from any situation? If so, state particulars. No.

732 19. Give particulars and amount of any debt you owe or liability you are under; also state whether you are endorser or surety for any one, and to what extent? I am bondsman for several parties as Notary Public, and others such as in my bank business I found advantageous. Sometimes owe considerable money, but do not care to name amounts, and owning as I do some $300,000 worth of property, I believe I never gave a mortgage. I borrow when I require money, but usually have good bal. in bank.

20. Have you hitherto given security? If so, please give names and addresses of your bondsmen,

NOTE.—If the required information is not given in response to the foregoing questions it will be necessary to return this blank to you for completion. The answers will be treated as strictly confidential.

BLEED THROU

and state why discontinued. All are discharged except one, as nearly as I remember; as administrator, I have repeatedly had bondsmen at various times. 733

21. Do you now furnish security in addition to that herein applied for? If so, how, and to what extent? No.

22. Have you ever applied to any other source for a ond? If so, state when and to whom, and, whether successful. No, and am not required to do so.

23. What was your occupation immediately preceding your present position, and for what reason did you leave the same? Was formerly living at Cheyenne, and am now President of Cheyenne National Bank and the heaviest shareholder. 734

24. Please fill in the following blanks, giving dates of your employment and names of employers during the past ten years.

From What Date.	To What Date.	Employed as	At Address	In Service of Name of Employer or Corporation.	Under Name of Manager, Superintendent or Head of Department—for reference.
During	the enti	re ten years past I have b	een connected	with the Cal. Nat. Bank	or Cheyenne Nat. Bank,
either a	s Cashie	r or Prest and am now Pr	est. of both and	the largest shareholde	r in both. I refer to their
Cashier	G. S.	Beard, at Cheyenne, Wyo.,	or G. N. O'Brien	here, or Mr. Collier, of	San Diego. 735

25. Give reasons in full for leaving former employers. Previous answers show I did not leave.

26. If your life is insured, state for what amount, for how long a time, and in what Company. Yes; aggregating say 100m; Equitable and the N. Y. Mutual, about 50,000 each.

27. Please give particulars respecting parents and nearest relatives, if living, as follows:

H POOR COPY

736 Name of Father. Cornelius Collins. Address, Shrewsbury, P. Business, Farmer.
Name of Mother, died many years ago.
Name of nearest male relative on Father's side, Jas. W. Collins. Address, Peach Bottom, York Co., Pa.
Name of nearest male relative on Mother's side, Address, Tennessee; don't know P. O. address.
Brother, A. G. Collins, Hebron, Neb.

28. The applicant is requested to give below the names and addresses of as many persons as possible for Referees, *not less than five*, who are not related
737 to him. ☞ In no case, however, must a Referee be named who is one of the firm or an officer of the Bank or Company in whose favor the bond herein applied for is to be made.

NOTE.—If the required information is not given in response to the foregoing questions it will be necessary to return this blank to you for completion. The answers will be treated as strictly confidential.

	NAME.	OCCUPATION.	POST OFFICE ADDRESS. No. of Street, if in a City.
1	.....	.....	.....
2	Jas. Gerry, M.D..	Physician.....	Do
3	G. Eli H. Murray.....	Contractor, Carpenter.....	San Diego.
4	A. G. M. Leed...	Landowner and Editor	Denver, Col.
738 5	Hon. E. L. N. Morgan.....	Atty. at Law.....	Cheyenne, Wyo.
6	M. M. Hamma...	Brokers' Clerk	Denver, Col.
7	W. R. Stebbins, Elsmore, Cal...	Banker and Lawyer.	C/o Chrystie & Jarvey, 6 Wall St., N. Y.
8	William Collier..	Banker	San Diego, Cal.

IN CONSIDERATION of the American Security Company agreeing or consenting to issue on my behalf, a certain bond or obligation upon the statements contained in this application, guaranteeing the employer, herein named, against any loss or

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damages, arising out of any act of default, mis- 739
carriage or neglect of mine, I DO HEREBY COVENANT, PROMISE AND AGREE and bind myself, my heirs, executors, administrators, and assigns to indemnify and at all times keep amply indemnified and save harmless, the said Surety Company of, from and against any and all loss, costs, damages, charges and expense whatsoever which the said Company shall or may for any cause, at any time, sustain, or incur, by reason or in consequence of said Company having entered into and executed said Bond or obligation.

AND I DO ALSO expressly agree to indemnify and save harmless the said Surety Company from all loss or damage, by reason of its having entered 740
into and executed any other bond or obligation on my behalf, required by me, to be given in the service of the said employer, or assigns, whether induced by representations disclosed in this application, or in any subsequent application submitted for such guarantee, or upon any statements or representations made by me, or by any person duly authorized and acting in my behalf, hereby intending to become responsible to said Company for any loss by it sustained by reason of having entered into any obligation, bond or guarantee issued for me or on my account.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my seal this 8th day of July, 741
1891.

JOHN W. COLLINS [SEAL].

Signed, sealed and delivered in the presence of—

H. G. GWYN.

Post office address in full, C/o California Nat. Bank, San Diego, Calif.

If this application is declined the Company reserves the right to withhold the reason therefor, if

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742 deemed necessary, as all information relative thereto is regarded as confidential.

EMPLOYER'S CERTIFICATE.

I have read the foregoing declarations and answers made by and believe them to be true.

He has been in the employ of this during years; and to the best of my knowledge has always performed his duties in a faithful and satisfactory manner.

His accounts were last examined on the day of , 18 , and found correct in every
743 respect. He is not to my knowledge, at present, in arrears or in default.

I know nothing of his habits or antecedents affecting his title to general confidence, or why the bond he applies for should not be granted to him.

Amount required, $. Bond to date from , 18 .

Dated at , the day of 18 .

(Signature) .....

On behalf of .....

NOTE.—If the required information is not given in response to the foregoing questions it will be necessary to return this blank to you for completion. The answers will be treated as strictly confidential.

NOTE.—If applicant is newly employed, write here "New Employee," and give name and address
744 of persons by whom he was introduced to you.

FOR THE EXCLUSIVE USE OF THE HOME OFFICE.

References Mailed July 20, 1891 ... References Duplicated.....

Additional References Requested... Received and Mailed .....

E. G. S. Mailed to Employer..... Returned Completed.....

Wrote..... .....Agency in re .....

Wrote Employer .....

Wrote Applicant.....

.....

.....

.....

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Defendant's Exhibit "E." 745

Being described as statement of all property conveyed by J. W. Collins in his lifetime as security for the payment of his indebtedness to the California National Bank.

Real Estate.

Lots A, F, G, H and I in Block 244 of Horton's addition in the City of San Diego, value	$4,500 00
29 lots in University Heights, value	580 00
An undivided interest in a lot of land in Pueblo, lot 1110, said to be equivalent in size to all lots, 25 feet by 40 feet each; probable value 746	50 00
118 lots in Park Villas, an addition to the City of San Diego, value	1,180 00

Personal Property.

A leasehold in Lot D, of Block 36 of Horton's addition in the City of San Diego, and some furniture in the building. This lease has expired and the amount realized therefrom was the sum of	28 50
4 Life Insurance policies were assigned by said Collins to the Bank. These have been collected, and the amount realized therefrom was the sum of 747	20,448 17
Five shares of the Silver Gate Building and Loan Association, value	750 00
2,821 shares of the College Hill Land Association, probable value	1,692 00

There was also assigned some stock of the California National Bank, some stock of the Hotel Brewster Company, some stock of the Rose Canon Brick Company, some stock of the Silver Gate Manufacturing Company, all of the foregoing are valueless.

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748 There was an interest conveyed by deed in real estate in the State of Wyoming, from which nothing has been realized and which is considered valueless, being covered by prior liens to its full value.

There was some real estate conveyed by said Collins situated in the City of Sonoma, California; but it was mortgaged for its full value, and the mortgage has been foreclosed.

There was also other property included in some of his conveyances, but which, upon investigation, was shown to be valueless on account of defect in title and encumbrances thereon; and some pieces of property in which he had no interest whatever, but held the same simply as trustee for the Bank.

749 (Signed) FREDERICK N. PAULY.

The foregoing bill of exceptions contains all of the evidence in any way material to any of the facts in issue.

The defendant by its counsel prays that this its bill of exceptions might be signed and sealed, and it is signed and sealed accordingly.

WILLIAM J. WALLACE,
Circuit Judge.

Gentlemen:

Please take notice that the within is defendant's bill of exceptions in the action therein entitled.

750 Dated January 12, 1895.

Yours, &c.,
HENRY C. WILLCOX,
Attorney for American Surety Company,
160 Broadway,
New York City.

To Messrs. MITCHELL & MITCHELL,
Plaintiff's Attorneys.

To THE CLERK OF THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

(Endorsed)—United States Circuit Court, Southern District of New York.—Frederick N. Pauly, as Receiver of the California National Bank of San

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10993

Diego, California, Plaintiff, against American Surety Company of New York, Defendant.—Action No 2.—Bill of Exceptions.—Henry C. Willcox, Attorney for Defendant, No. 160 Broadway, New York City, N. Y.—Service of a copy of the within Bill of Exceptions, &c., is hereby admitted this 12 day of Jany., 1895.—Mitchell & Mitchell, Plffs. Attorneys.—U. S. Circuit Court.—Filed Mar. 27, 1895.—John A. Shields, Clerk. 751

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

752

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California, Plaintiff,	At Law. Assignment of Errors.
AGAINST	Action No. 2. (Collins, President.)
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.	

753

The defendant in this action, in connection with its petition for writ of error, avers:

That in the record and proceedings in this action, and also in the matters recited and contained in the bill of exceptions, and also in the giving of the verdict and judgment aforesaid, there is manifest error, in that the Judge presiding at said Circuit, against the objection of the defendant, made the following rulings, each of which was erroneous and to the injury of the defendant, to wit:

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754 1. During the examination of Chas. L. Brimhall, a witness for plaintiff, after the witness had testified that the account of Mr. Collins was on page 120 of Ledger 4, and as to the manner of keeping said account, said Judge erroneously permitted plaintiff's counsel to put said account in evidence.

2. During the examination of said Brimhall, after the witness had stated that the account on page 120 of Ledger 4 was continued in Ledger 5, said Judge erroneously permitted plaintiff's counsel to put said continuation of said account in evidence.

3. During the examination of said Brimhall, after
755 the witness had testified that the regular ledger account of Collins closed on November 11, 1891, said Judge erroneously permitted plaintiff's counsel to ask of the witness, "What was the seeming balance at that time?"

4. During the examination of said Brimhall, after said witness had stated that the apparent balance to the credit of Mr. Collins on November 11, 1891, was $11,420.90, said Judge erroneously permitted plaintiff's counsel to ask the witness, "Do you find on the credit side of that account, on or about the 13th day of October, a credit of $24,000? Just read what you find."

756

5. During the examination of said Brimhall, said witness replied to the question thus asked, "A credit of $20,000, marked 'Western National,' and $24-500, marked 'United States National,'" and thereupon said Judge erroneously denied defendant's motion to strike out said answer.

6. During the examination of said Brimhall, immediately after the admission of the proof of claim of June 24, 1892, said Judge erroneously denied defendant's motion to strike out said testimony in regard to said credits of $20,000 and $24,500,

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claimed to have been made on the books of the California National Bank. 757

7. During the examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to ask the witness, "What, if any, credits do you find to Collins' account on the 13th and 14th of October?"

8. During the examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to ask the witness, "What is the full entry there? Is there anything in lead pencil on either one of those?"

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9. During the examination of said Brimhall, the said Judge erroneously permitted plaintiff's counsel to ask the witness the following, "And the other?"

10. During the examination of said Brimhall, and after said witness had produced a deposit tag, dated October 14, 1891, for $500, said Judge erroneously permitted plaintiff's counsel to put said deposit tag in evidence as Plaintiff's Exhibit "2."

11. During the examination of said Brimhall, and immediately after the ruling aforesaid, said Judge erroneously permitted plaintiff's counsel to put another deposit tag, dated October 13, 1891, for $24,500, in evidence as Plaintiff's Exhibit "3." 759

12. During the examination of said Brimhall, and immediately after the ruling aforesaid, said Judge erroneously permitted plaintiff's counsel to put another deposit tag dated October 13, 1891, for $20,000, in evidence as Plaintiff's Exhibit "4."

13. During the examination of said Brimhall, said Judge erroneously denied defendant's motion to strike out Plaintiff's Exhibit "2."

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760 14. During the examination of said Brimhall, said Judge erroneously denied defendant's motion to strike out the evidence about the tags therein referred to.

15. During the examination of said Brimhall, said Judge erroneously permitted plaintiff's counsel to put said deposit tag, so marked Plaintiff's Exhibit "4," in evidence, a second time.

16. During the examination of said Brimhall, said Judge erroneously permitted plaintiff's counsel to put deposit tag so marked Plaintiff's Exhibit "3" in evidence, a second time.

761 17. During the examination of said Brimhall, said Judge erroneously permitted plaintiff's counsel to put deposit tag so marked Plaintiff's Exhibit "2" in evidence, a second time.

18. During the examination of said Brimhall, said Judge erroneously permitted plaintiff's counsel to put a book claimed to be the Teller's Book of the California National Bank in evidence, marked Plaintiff's Exhibit "5."

19. During the examination of said Brimhall, said Judge erroneously permitted plaintiff's counsel to ask the witness, "I hand you four checks and ask
762 you by whom those were signed?" (handing witness papers).

20. During the examination of said Brimhall, said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "6" a check dated May 25, 1891, purporting to be signed by J. W. Collins on the California National Bank for $25,000, to the order of C/D.

21. During the examination of said Brimhall, said Judge erroneously permitted plaintiff's counsel to

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ask the witness: "Was that check ever charged against J. W. Collins in the account?" 763

22. During the examination of said Brimhall, the said Judge erroneously permitted plaintiff's counsel to ask the witness: "It has not been entered against Collins' account?"

23. During the examination of said Brimhall, the said Judge erroneously permitted plaintiff's counsel to ask the witness: "The next one is July 20, 1891; was that check ever charged against Mr. Collins' account?"

24. During the examination of said Brimhall, said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "7" a check dated July 20, 1891, purporting to be signed by J. W. Collins for $20,000 on the California National Bank to the order of C/D. 764

25. During the examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "8" a check dated September 16, 1891, purporting to be signed by J. W. Collins on the California National Bank for $15,000 to the order of C/D.

26. During the examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to ask the witness: "Was that ever entered against J. W. Collins?" 765

27. During the examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "9" a note purporting to be signed by J. W. Collins, August 22, 1891, for $51,038.35 to the order of the California National Bank.

28. During the examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to

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766 put in evidence as Plaintiff's Exhibit "10" a note purporting to be signed by J. W. Collins, September 15, 1891, for $6,659 to the order of the California National Bank.

29. Before the cross-examination of said Brimhall said Judge erroneously denied the motion of defendant's counsel to strike out the notes Plaintiff's Exhibits "9" and "10."

30. During the cross examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put the General Ledger of the California National Bank in evidence.

767

31. During the cross examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "11" deposit tag dated March 25, 1891, for $25,000.

32. During the cross-examination of said Brimhall said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "12" deposit tag, dated May 2, 1891, for $40,000.

33. During the examination of George S. Hickok, a witness for the plaintiff, said Judge erroneously permitted plaintiff's counsel to ask the witness:
768 "State what the transaction was."

34. During the examination of said Hickok, said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "13," a note purporting to be signed by J. W. Collins, April 1, 1891, for $25,000, to the order of the National Park Bank of New York.

35. During the examination of said Hickok, said Judge erroneously permitted plaintiff's counsel to ask the witness: "What was the transaction?" referring to a transaction stated to have occurred

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between the California National Bank and the National Park Bank of New York, on June 10, 1891. 769

36. During the examination of said Hickok said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "14," a deposit tag, dated June 6, 1891, for $20,000.

37. During the examination of said Hickok said Judge erroneously permitted plaintiff's counsel to put in evidence Plaintiff's Exhibit "15," a note purporting to be signed by J. W. Collins, June 3, 1891, to the order of the National Park Bank of New York for $20,000.

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38. After the reading of the deposition of S. N. Wood, a witness for the plaintiff, the said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "18" Certificate of Deposit No. 6479, dated May 23, 1891, $7,500 to the order of J. W. Collins.

39. After the reading of the deposition of said Wood, said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "19" Certificate 6480, dated May 23, 1891, $7,500, to the order of J. W. Collins.

40. After the reading of the deposition of said Wood, said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "20," Certificate No. 6481, dated May 23, 1891, $10,000, to the order of J. W. Collins. 771

41. Upon the reading of the deposition of said Wood, said Judge erroneously permitted plaintiff's counsel to read in evidence the question: "Please state in full what conversation you had, if any, with Mr. Collins in regard to said certificates and what application he made of the money raised upon them, if you know?"

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772 42. At the conclusion of the reading of the deposition of said Wood, said Judge erroneously denied defendant's motion to strike out all of said deposition on the ground that the transaction therein referred to was an individual transaction of J. W. Collins.

43. During the reading of the deposition of C. J. White, a witness for plaintiff, said Judge erroneously permitted counsel for the plaintiff to put in evidence as Plaintiff's Exhibit "21," a deposit tag, dated April 21, 1891, for $20,000.

44. During the reading of the deposition of said
773 White, said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit "22," a letter dated February 10, 1891, addressed to National Bank of Commerce of Kansas City, and signed by G. N. O'Brien.

45. During the examination of William D. Bloodgood, a witness for the plaintiff, said Judge erroneously permitted plaintiff's counsel to ask the witness: "When did you discover the transaction of the 22d of September, 1891, the 13th and 14th of October, 1891, and the 31st of October, 1891, which are detailed in that paper?" (explanation sheet).

46. During the examination of said Bloodgood
774 said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit 23 the paper styled "Explanation Sheet."

47. During the examination of said Bloodgood, after the witness had stated that Mr. O'Brien had made a demand upon Mr. Pauly for his salary, said Judge erroneously permitted counsel for the plaintiff to ask the witness: "And what did Mr. Pauly respond?"

48. During the examination of Frederick N. Pauly, as a witness in his own behalf, said Judge er-

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roneously permitted plaintiff's counsel to put in evi- 775
dence as Plaintiff's Exhibit 39 a statement claimed to have been sent defendant by plaintiff.

49. During the examination of said Pauly said Judge erroneously permitted plaintiff's counsel to put in as Plaintiff's Exhibits 40, 41 and 42 three telegrams in cipher.

50. At close of the testimony of Ferdinand W. Lafrentz, a witness for defendant, said Judge erroneously permitted plaintiff's counsel to put in evidence as Plaintiff's Exhibit 43 a deposit tag dated March 25, 1891, $20,000.

51. At the close of plaintiff's case said Judge erro- 776
neously denied defendant's motion to strike out the testimony in regard to the deposit slip of May 2, 1891, $40,000, said to be in the handwriting of Harry E. O'Brien, and which purports to relate to Brunell & Co., of Chicago, two items of $20,000 each, $40,000.

52. At close of plaintiff's case said Judge erroneously denied the motion of defendant to strike out testimony in regard to note of J. W. Collins, dated August 22, 1891, payable six months after date, for $51,038.35.

53. At close of plaintiff's case said Judge erro- 777
neously denied defendant's motion to strike out testimony in regard to the note of J. W. Collins, of September 15th, for $6,659.

54. At the close of plaintiff's case said Judge erroneously denied defendant's motion to strike out testimony in regard to the credits of October 13th and 14th, $20,000 and $25,000, respectively.

55. At close of plaintiff's case said Judge erroneously refused to grant defendant's motion of nonsuit.

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778 56. After denial of defendant's motion for a nonsuit as aforesaid, said Judge erroneously denied defendant's motion to strike out the item of $20,000, of March 25, 1891—the Union National Bank.

57. During the examination of William D. Bloodgood, said Judge erroneously asked said witness: "How did the $25,000 go out?"

58. During the examination of said Bloodgood said Judge erroneously denied defendant's motion to strike out the testimony of the said witness concerning his opinion as to how an item of $40,000 got into the account, or how it came to get out of it.

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59. After the examination of said Bloodgood, and near the close of the defendant's case, said Judge erroneously permitted plaintiff's counsel to put in evidence the report of the plaintiff to the Comptroller of the Currency, dated on or about January 27, 1892.

60. At the close of the testimony the said Judge erroneously denied the motion of the defendant to dismiss the complaint.

61. The said Judge erroneously refused to charge the jury, as requested by defendant:

780 "There can be no recovery in this action for or by reason of the loan of $25,000 from the United States National Bank of New York, on or about the 13th or 14th day of October, 1891, nor for or by reason of any credit alleged to have been given by reason of such loan."

62. Said Judge erroneously refused to charge the jury, as requested by defendant:

"There can be no recovery in this action for or by reason of the loan of $20,000 from the Western National Bank on or about the 13th or 14th of

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October, 1891, nor for or by reason of any credit alleged to have been given by reason of such loan." 781

63. Said Judge erroneously refused to charge the jury as requested by the defendant:

"If the jury find upon the evidence that the plaintiff did not as soon as it came to his knowledge that Collins had been guilty of an act or acts which might involve a loss to be claimed of the surety company under the bond, notify said company as soon as practicable, after obtaining such knowledge, then there can be no recovery in this action. He could not delay giving such notice, until he had actually discovered that such act or acts did involve a loss."

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64. Said Judge erroneously refused to charge the jury, as requested by defendant:

"If the jury find upon the evidence that the plaintiff did not serve upon the Surety Company written proof of his claim as soon as practicable after discovery of any loss occasioned by the acts of Collins, then there can be no recovery in this action, and by serving such proof of claim 'as soon as practicable' is meant that the plaintiff must have served it as soon as by the exercise of reasonable diligence he was able to draw up and verify such written proof of claim and transmit it to the company."

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65. Said Judge erroneously refused to charge the jury as requested by the defendant:

"If the jury find upon the evidence that on or before the 1st day of March, 1892, Mr. Pauly knew of any of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company."

66. Said Judge erroneously refused to charge the jury as requested by the defendant:

"If the jury find upon the evidence that on or before the 1st day of April, 1892, Mr. Pauly knew of

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784 any of the various losses for which he now seeks to recover, then they must find a verdict for the Surety Company."

67. Said Judge erroneously refused to charge the jury as requested by defendant:

"The defendant in this action is entitled to all the right of any surety. The law looks with favor upon a surety, and does not deem it in the least degree improper upon his part to insist upon a strict compliance with all the terms and conditions of the contract, which were inserted therein for his benefit."

68. Said Judge erroneously refused to charge the
785 jury as requested by defendant:

"There can be no recovery in this action upon any item of claim made at this trial, unless a claim in regard to such item was set forth in the proof of claim served upon the defendant, nor unless such item of claim has been proved upon this trial as it was set forth in said proof of claim."

69. Said Judge erroneously refused to charge the jury as requested by defendant:

"Before a recovery can be had upon any one of the alleged false credits mentioned upon this trial, it must be shown by the plaintiff that such credit
786 was actually a false credit. The credit itself as entered upon the books of the bank was in itself an admission binding upon the bank and upon this plaintiff that the bank had received from Collins money or value to the amount of the credit, and this admission must be in some way overthrown by the plaintiff before he can claim to recover for or by reason of that credit."

70. Said Judge erroneously refused to charge the jury as requested by defendant:

"The books and papers of the bank are not of themselves, nor are entries therein, binding upon

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this defendant, or evidence against it, and the jury must not accept as evidence any entry therein, unless established by the testimony of some witness having personal knowledge of the transaction to which the entry relates, and establishing such transaction by means of such knowledge." 787

71. Said Judge erroneously refused to charge the jury as requested by defendant:

"Even if the jury find that the credits of $25,000 and $20,000, for which plaintiff seeks to recover, were fraudulently and dishonestly obtained by Collins, that alone does not make out the plaintiff's claim. He must show that a loss resulted from these credits, and in considering this latter question the jury must not regard the alleged earlier false credits that have been given in evidence. These earlier credits have no legitimate bearing upon the question of loss from the latter ones." 788

72. Said Judge erroneously refused to charge the jury, as requested by defendant:

"The jury cannot infer fraud or dishonesty upon Collins' part, in regard to any item here claimed, upon the theory that Collins was heavily indebted to the bank outside of such item or items. There is no legal or sufficient evidence that Collins was ever so indebted to the bank in any considerable amount." 789

73. Said Judge erroneously refused to charge the jury, as requested by defendant:

"No act of O'Brien is of itself evidence in this case against the Surety Company, or even against Collins; no such act can be considered by the jury to the prejudice of the Surety Company until it is shown that Collins either directed or procured it to be done, or else that he approved and ratified it."

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790 74. Said Judge erroneously refused to charge the jury, as requested by defendant:

"Nothing that Collins may have done, after any act done by O'Brien, can be considered as a ratification of O'Brien's act, unless it appears by the evidence that Collins knew what O'Brien had done."

75. Said Judge erroneously refused to charge the jury as requested by the defendant:

"The law presumes, in the first instance, that Collins was innocent of any fraud or dishonesty in connection with any transaction on account of which plaintiff seeks to recover. This presumption will,
791 of itself, be enough to defeat the plaintiff, unless he can in some way overthrow it."

76. Said Judge erroneously refused to charge the jury as requested by the defendant:

"The plaintiff has not overthrown the presumption of innocence and honesty on Collins' part, unless there is evidence in the case that cannot be reconciled with such innocence and honesty. If all the facts in evidence, taken together in their proper relation to each other, permit the belief that Collins was innocent of any fraud or dishonesty, if they leave room for an inference of an honest intent, the plaintiff has failed to make out his case and cannot
792 recover."

77. Said Judge erroneously refused to charge the jury as requested by the defendant:

"If the jury find that, at the time of making application for or receiving the bond in suit, any person acting for the bank represented to the Surety Co. that the accounts of the cashier, O'Brien, had been examined and had been found to be correct, and that the surety relied upon such representation when in truth those accounts showed that prior to

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that time Collins had been guilty of dishonest and fraudulent conduct in connection with his duties as president of the bank, then there can be no recovery in this action." 793

78. Said Judge erroneously refused to charge the jury as requested by defendant:

"If the jury find that at the time of making application for the bond in suit any person acting for the bank falsely and fraudulently, and with knowledge to the contrary represented to the Surety Company that the accounts of the Cashier O'Brien had been examined and had been found to be correct, when in truth those accounts show that prior to this time Collins had been guilty of dishonest and fraudulent conduct in connection with his duties as president of the bank, then there can be no recovery in this action." 794

79. Said Judge erroneously refused to charge the jury as requested by defendant:

"If the jury find upon the evidence that the bond in suit was procured by concealment or misrepresentation of any facts showing prior dishonest or fraudulent conduct on the part of Collins, then plaintiff cannot recover, no matter who was guilty of such concealment or misrepresentation. The bank cannot now enforce the bond without being affected by the consequences of such concealment or misrepresentation." 795

80. Said Judge erred in instructing the jury as follows:

"The plaintiff has established a *prima facie* case against the defendant, because he gave the written statement of loss, and subsequently transmitted to the defendant a copy of the account upon which it was based."

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796 81. Said Judge erred in instructing the jury:

"The plaintiff has made a *prima facie* case upon this issue because he has complied with that condition of the policy which prescribes that the written statement of claim shall be *prima facie* evidence of a loss within the terms of the policy."

82. Said Judge erred in instructing the jury:

"Now, it is for you to say upon the other evidence in the case, which has been elicited principally upon the cross-examination of the plaintiff's witnesses, whether the defendant has overcome that case, if you conclude that the defendant has overcome that
797 presumption, and, upon all the evidence before you, that the transactions in controversy are as consistent with the theory of honesty on the part of the president, as of his dishonesty or fraud, then the defendant will be entitled to your verdict."

83. Said Judge erred in instructing the jury:

"That about that time he sent telegrams in cipher to the cashier of the bank in San Diego," which said instructions occurred in connection with and immediately after language as follows:

"I am not going to call your attention to that evidence in any detail, suffice it to say that it tends
798 to prove that on or about the 13th of October the president of the bank procured a discount of certain notes of the bank with the customers' notes belonging to the bank as collateral, to the amount altogether of about $45,000."

84. Said Judge erred in instructing the jury:

"That when the bank failed, the apparent balance to the credit of the president in his private account was about $11,000, showing that he had drawn out about $34,000 of the $45,000, which had been placed to his credit on the 13th and 14th of October."

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85. Said Judge erred in instructing the jury as 799
follows:

"The jury may find from the evidence that after these items of credit were placed to his account he drew out about $35,000 from his account."

86. That the verdict in said cause was in favor of the plaintiff, whereas by the law of the land it ought, under the facts in the case, to have been for the defendant.

87. That the judgment below was entered in the said cause in favor of the plaintiff, whereas by law it ought to have been entered in favor of the defendant. 800

Therefore, the said American Surety Company of New York prays that the judgment aforesaid, by reason of the errors aforesaid, may be reversed, annulled and for nothing holden; that the company may be restored to all things which said company has lost by occasion of said judgment.

HENRY C. WILLCOX,
Attorney for Defendant being Plaintiff in Error,
160 Broadway,
New York City.

GEORGE A. STRONG,
HENRY C. WILLCOX,
Of Counsel. 801

(Endorsed)—United States Circuit Court, Southern District of New York.—Frederick N. Pauly, as Receiver of the California National Bank of San Diego, California, Plaintiff, against American Surety Company of New York, Defendant.—At Law—Assignment of Errors.—(Action No. 2).—Henry C. Willcox, Attorney for Defendant, No 160 Broadway, New York City, N. Y. —U. S. Circuit Court.—Filed Apr. 1, 1895.—John A. Shields, Clerk.

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802 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California, Plaintiff,	At Law. Bond on Writ of Error.
AGAINST	
803 AMERICAN SURETY COMPANY OF NEW YORK, Defendant.	Action No. 2. (Collins, President.)

KNOW ALL MEN BY THESE PRESENTS, that we, the American Surety Company, of New York, as principal, and the Fidelity and Casualty Company of New York, as surety, are held and firmly bound unto the plaintiff, Frederick N. Pauly, as Receiver of the California National Bank of San Diego, California, in the full and just sum of twenty-five thousand dollars, to be paid to the said plaintiff, his certain
804 attorneys, executors, legal representatives or assigns; to which payment well and truly to be made, we bind ourselves, our successors and legal representatives, jointly and severally by these presents. Sealed with our corporate seals and dated this 27th day of March, 1895.

Whereas, lately at a Circuit Court of the United States, for the Southern District of New York, in an action pending in said Court between Frederick N. Pauly, as Receiver of the California National Bank of San Diego, California, plaintiff, and the American Surety Company of New York, de-

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fendant, a judgment was entered against 805
the said American Surety Company of New York, and the said American Surety Company of New York, having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid action, and a citation directed to the said Frederick N. Pauly, as Receiver of the California National Bank of San Diego, California, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit, to be holden at the City of New York, in said Circuit, on the 30th day of April next.

Now, the condition of the above obligation is such, that if the said American Surety Company of New 806
York, shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered }
in presence of— }
L. E. CARMAN.

AMERICAN SURETY COMPANY OF NEW YORK,
By DAVID B. SICKELS,
2d Vice-President.
WM. E. KEYES,
[SEAL.] Secretary. 807

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
By GEO. F. SEWARD,
President.
ROBT. J. HILLAS,
[SEAL.] Secretary.

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808 STATE OF NEW YORK, }
City and County of New York, } ss.:

On this 27th day of March, 1895, before me personally appeared David B. Sickels, second vice-president of the American Surety Company of New York, with whom I am personally acquainted, who, being by me duly sworn, said: That he resided in the City of New York; that he is the second vice-president of the American Surety Company of New York; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of trustees of said company, and he signed said instrument as second vice-president
809 of said company by like authority. And the said David B. Sickels further said that he was acquainted with Wm. E. Keyes and knew him to be the secretary of said company; that the signature of said Wm. E. Keyes subscribed to the said instrument is in the genuine handwriting of the said Wm. E. Keyes and was thereto subscribed by the like order of the said board of trustees, and in the presence of him, the said David B. Sickels, second vice-president.

L. E. CARMAN,
[SEAL.] Notary Public (No. 13),
New York Co.

Certs. filed in Kings, Queens, Richmond, West-
810 chester, Dutchess, Putnam, Orange,

STATE OF NEW YORK, }
City and County of New York, } ss.: 811

On this 29th day of March, 1895, before me personally appeared George F. Seward, president of the Fidelity and Casualty Company of New York, with whom I am personally acquainted, who, being by me duly sworn, says: That he resides at East Orange, N. J.; that he is the president of the Fidelity and Casualty Company of New York; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed thereto by order of the Board of Directors of said company, and that he signed said instrument as president of said company, by like 812
authority. And the said George F. Seward further says he is acquainted with Robert J. Hillas, and knows him to be the secretary of said company; that the signature of the said secretary subscribed to the said instrument is in the handwriting of said Secretary, and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him, the said George F. Seward.

GEORGE A. DEWEY,
[SEAL.] Notary Public,
Kings Co.,
Cert. filed in N. Y. Co.

(Endorsed)—United States Circuit Court, Southern District of New York.—Frederick N. Pauly, as 813
Receiver, &c., Plaintiff, against American Surety Company of New York, Defendant.—Action No. 2.—At Law—Bond on Writ of Error.—Henry C. Willcox, Attorney for Defendant, No. 160 Broadway, New York City, N. Y.—Approved April 1, 1895, E. H. Lacombe, U. S. Circuit Judge.—U. S. Circuit Court.—Filed Apr. 1, 1895.—John A. Shields, Clerk.

814 City, County and State of New York, ss.:

WILLIAM C. DOUGLAS, being duly sworn, says: That he is managing clerk in the office of Henry C. Willcox, Esq., attorney for American Surety Company of New York; that on the 3d day of April, 1895, at four o'clock in the afternoon, at the office of Mitchell & Mitchell, No. 44 Wall street, New York City, he served the within citation on Mitchell & Mitchell, attorneys for Frederick N. Pauly as Receiver, &c., by delivering to William Mitchell, of said firm, personally, a true copy of said citation and leaving the same with him.

WILLIAM C. DOUGLAS.

815 Sworn to before me this 4th day of April, 1895.

JOHN C. MOWBRAY,
Notary Public,
Kings Co.
Ctf. filed in N. Y. Co.

THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

816 THE UNITED STATES OF AMERICA, Second Judicial Circuit, } ss.:

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit, to be holden at the City of New York, in said Circuit, on the 30th day of April next, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court for the Southern District of New York,

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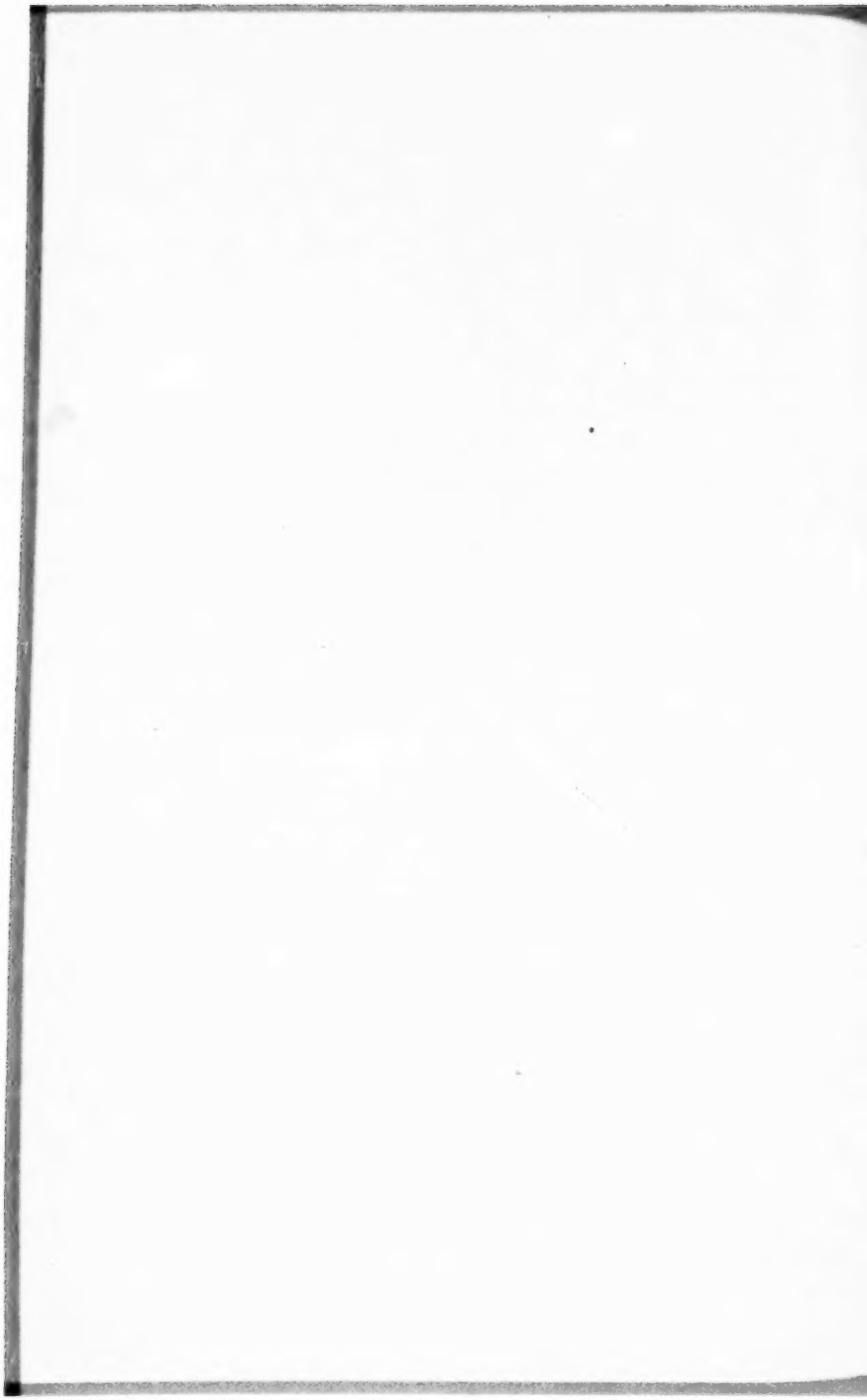
wherein the American Surety Company of New 817
York is plaintiff in error (Action No. 2) and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 1st day of April, 1895, and of the independence of the United States of America the one hundred and nineteenth.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed)—United States Circuit Court of Appeals 818
for the Second Circuit.—American Surety Company of New York, Plaintiff in Error, against Frederick N. Pauly, as Receiver, &c., Defendant in Error.—Action No. 2.—Citation.—Henry C. Willcox, Attorney for Plaintiff in Error, No. 160 Broadway, New York City, N. Y.—U. S. Circuit Court.—Filed Apr. 5, 1895.—John A. Shields, Clerk.



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276 United States Circuit Court of Appeals, Second Circuit.

AMERICAN SURETY COMPANY, Plaintiff in Error,
vs.
FREDERICK N. PAULY, Defendant in Error.
} Action No. 2. President's Case.

This is a writ of error to review a judgment of the circuit court, southern district of New York, for $28,521.16, entered upon the verdict of a jury against the American Surety Company. The plaintiff below sued as receiver of the California National Bank of San Diego, California, to recover the amount of a bond for $25,000, issued by the company, insuring the bank against any act of fraud or dishonesty committed by its president, one John W. Collins. The facts in the case are largely the same as in action No. 1, between the same parties, to recover on a similar bond insuring the fidelity of O'Brien, the cashier, and in which the opinion of this court is handed down simultaneously with the following. Most of the proof taken in the one case was read in evidence in the other. It will be unnecessary, therefore, in this opinion to review the facts which are fully stated in the opinion in the cashier's case, nor to repeat anything said therein as to assignments of error which are common to both cases. It will be sufficient to discuss only such points as are peculiar to the case at bar.

LACOMBE, *Circuit Judge:*

I. The first notification to the surety company, in this case
277 as in the other, was sent May 23rd, 1892, and the proofs of loss transmitted June 24, 1892. There was a similar conflict of evidence as to the date when the receiver acquired knowledge of Collins' acts of fraud or dishonesty, and the question whether notice and proofs of loss were sent with reasonable promptness was left to the jury under a charge more favorable even to the defendant below than was the charge in the O'Brien case. In view of the evidence and of the instructions given by the court, plaintiff may fairly be given the benefit of the presumption that the jury found discovery to have been made as late as "a few days before May 23rd, 1892." It is contended that this was more than six months from the death, dismissal, or retirement of the employee. The receiver qualified and took possession December 29, 1891, and Collins died March 3rd, 1892. Plaintiff in error relies upon the fact that on November 12, 1891, the bank examiner took possession of the assets of the bank, which had suspended payment. That act, however, did not operate as a "dismissal or retirement of the employee from the service of the employer," which is the phraseology of the bond. Collins on that date suspended the performance of his ordinary functions, because the bank suspended the transaction of a banking business, but the bank still existed as a national bank corporation and Collins was still its president. If at any time before the receiver took possession the parties interested in the bank had made good its deficit and the bank examiner had restored the assets, no new ap-

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pointment would have been necessary to put him in the service of his employer. The assignments of error covering this point are unsound.

II. It is next contended that the alleged loss was not set forth in the proof of claim.

278 In this case, as in the other, several distinct acts of fraud, with consequent loss, were declared upon, but the court left to the jury only the transactions of October 13th and 14th, 1891. What those were will be found fully stated in the opinion in the other case. So much of the proof of claim as refers to these transactions is as follows: In an affidavit of the receiver dated May 31st, 1892, and enclosed in a letter making demand, are these paragraphs:

"That on the 13th day of October, 1891, he, the said J. W. Collins, as president of said bank, and upon the representation that he was acting in behalf of said California National Bank of San Diego, obtained a loan from the United States National Bank of New York of twenty-five thousand dollars upon a note of the California National Bank of San Diego and by rediscounting the assets of said bank, and took and applied the said sum of $25,000, then and there the assets of said bank, to his individual use and embezzled said sum.

That on the same day, to wit, on October 13th, 1891, said J. W. Collins, while president of said bank and acting as such president, and upon the representation that he was acting in behalf of the said bank, obtained from the Western National Bank of New York a loan of $20,000 upon a note of said bank made payable to himself and collateralized with assets of said bank, and then and there, as such president, receiving said sum of $20,000, and in behalf of the said California National Bank of San Diego, and appropriated the same to his individual use and embezzled the same. * * * Affiant says that none of said sums of money so as aforesaid by said J. W. Collins abstracted and embezzled nor any part thereof were ever repaid or returned to said bank."

On the very day (May 31, 1892) this affidavit was sent from San Diego the surety company wrote from New York, enclosing

279 two claim blanks and asking to have itemized thereon any claims the receiver might have to present under the bonds of Collins and of O'Brien. In reply thereto the receiver wrote enclosing "two affidavits in regard to the embezzlement of the late J. W. Collins and George N. O'Brien, furnished after consultation with my legal adviser, as giving information fuller than I otherwise could do by using the blank sent me." Receipt of these two affidavits was duly acknowledged July 8, 1892, but most careful examination of the record fails to disclose them among the exhibits. The letter enclosing them was marked Exhibit 28; but singularly enough these affidavits seem not to have been offered or their omission from the correspondence in any way accounted for. If they were here it is possible that it would appear that the surety company was advised as to the nature of the transactions with a degree of explicitness sufficient to satisfy even the requirements of its own counsel in that regard, for reference to the opinion in the other case

will show that the proof of claim under O'Brien's bond was not criticised for failure to accurately describe the transactions, but only because it did not, in defendant's opinion, expressly aver that loss ensued to the bank from such acts. An affidavit dated June 24, 1892, marked Exhibit No. 1, was introduced as "proof of loss of June 24," and is probably one of these two affidavits. As to the transaction of October 13th and 14th, it is a duplicate of the affidavit of May 31st, already quoted from.

Subsequently and on July 18th, 1892, plaintiff sent to defendant a statement of the account of Collins with the bank, with corrections of the erroneous and fraudulent entries on the books, showing the amount of his deficiency to be $374,978.22. Corre-
280 spondence between the parties ensued extending over several weeks, the receiver offering to extend every facility to defendant's inspector in such examination as he might wish to make of the records of the bank, the company promising to send such inspector and making no objection to the form of the proof of loss. The criticism now advanced is that the proof of loss was faulty because it set forth a transaction different from the facts and was calculated to mislead the defendant. Briefly, the objection is to the statement that Collins "appropriated to his individual use and embezzled" the two sums loaned to the California bank by the United States National bank and the Western National bank respectively. The evidence shows that the loans were made by crediting the California bank on the books of the two New York banks with the amounts of the loans, and that such credits were subsequently exhausted by the payment of drafts of the California bank. Therefore, as defendant contends, Collins did not embezzle the same. Technically, this is so; but proofs of loss under a policy are not to be tested by the same rules as would be applied to an indictment or even to a pleading. They are mercantile documents. All that can reasonably be required of such a "written statement of the loss" is that it shall be a brief and general statement of the facts expressed in the language of commerce, and as thus expressed shall truthfully inform the company how the loss occurred, giving the facts and the result with substantial accuracy. As the word is used in ordinary speech, Collins did embezzle $24,500 and $20,000. He so arranged his fraudulent scheme that when the credits given to the California bank on the security of its property pledged as collateral with the two New York banks were converted into money by payment of the drafts of the California bank against such credits that money was diverted from the treasury of the latter bank into Collins' individual possession. He cheated
281 and embezzled the bank out of $44,500, which he got ostensibly for said bank by improperly pledging its assets in New York. The statement of loss might have stated the facts more fully, might have shown the details of the process by which the proceeds of the pledge of the California bank's property were forthwith so appropriated on its books that when they were subsequently drawn out of the New York banks they passed through the California bank direct to Collins; but even without such details it states the loss re-

sulting from Collins dishonest and fraudulent acts broadly and with substantial truthfulness. Unless documents such as these are to be construed closely and the insured to be held rigidly to a measure of technical and legal accuracy in framing their phraseology not to be expected in mercantile transactions, the statement of loss submitted in this case was sufficient; and we know of no principle of law and of no authority which requires them to be construed otherwise than liberally, unless, perhaps, either because of what they contain or because of what they omit the insurer is or may be misled to its prejudice. Defendant's counsel contends that the statement in this case was misleading, though there is no claim that the surety company was, in fact, misled. It is urged that upon receiving the statement the defendant company, if it had chosen to enquire as to the truth of claim of loss, would have ascertained from the New York banks that the loans had been made as asserted, but that the proceeds of such loans had been paid out not to Collins individually, but to the California bank on its own draft. This is so; but the conclusion sought to be drawn, viz., that "the surety therefore sees that the charge made in the proof of loss is absolutely false," is wholly unwarranted, for it might reasonably be true that the embezzle-
282 ment took place in California. Defendant therefore was not entitled to a direction of the verdict in its favor on the ground that the alleged loss was not set forth in the claim, nor on the ground that either preliminary notice or proof of loss had not been served as required by the bond.

Very many other assignments of error are found in the record, but as none of them are discussed in the brief of plaintiff in error (except some which are referred to in the opinion in the O'Brien case), it will be unnecessary to rehearse them here; it is sufficient to say that they have been examined and found to be unsound.

One point, however, which is not discussed upon the brief should be referred to.

III. The court charged the jury that the "plaintiff has established a *prima facie* case against the defendant, because he gave the written statement of loss, and subsequently transmitted to the defendant a copy of the account upon which it was based." To this and to its repetition in other words defendant duly excepted.

This part of the charge was based upon a provision of the bond which reads as follows: "It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, shall be *prima facie* evidence thereof."

It is contended that this does not mean that such statement shall be *prima facie* evidence in an action upon the bond; that "no such contingency was in the minds of the parties;" that it only refers to a consideration by the company of the question whether it will pay without suit; that it only indicates in what way the preliminary proof of a loss shall be made to the company; but neither
283 the phraseology of the clause nor its collocation with the rest of the bond thus restricts its meaning. It is certainly open to the construction put upon it by the trial judge; such construction

is a most natural one; nor is there anything extraordinary or startling in an agreement by the company that it will pay upon proof in a prescribed form being made to it, nor in its agreeing to accept such proof as *prima facie* sufficient to entitle the insured to a recovery in case of default. Conceding that it is also open to a construction which would confine it as plaintiff in error contends, it would be at least ambiguous, and it is elementary law that all obscurities and ambiguities in a policy of insurance are to be resolved against the underwriter who has himself drafted the instrument. There was no error, therefore, in the charge in the particular complained of.

The judgment of the circuit court is affirmed.

[Endorsed:] Action No. 2. Collins. Copy. Opinion.

284 At a stated term of the United States circuit court of appeals for the second circuit, held at the United States court-rooms, in the city of New York, on the second day of March, 1896.

Present: Hon. E. Henry Lacombe, Nathaniel Shipman, circuit judges.

THE AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff in Error,
against
FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California, Defendant in Error.

Order of Affirmance and for Mandate. Action No. 2. President's Case.

This action having come before this court on a writ of error sued out on the first day of April, 1895, to review the judgments of the circuit court of the United States for the southern district of New York herein, entered on the 31st day of December, 1894, and after argument by George A. Strong, Esq., of counsel for the plaintiff in error, and William Mitchell, Esq., of counsel for the defendant in error, and due deliberation having been had thereon—

Now, on motion of Edward Mitchell, Esq., attorney for defendant in error, it is—

Ordered, adjudged, and decreed that the judgment of the circuit court aforesaid be, and the same is hereby, in all things
285 affirmed, and that the defendant in error recover, in addition to said judgment, the amount of his costs and disbursements, to be taxed.

And it is further ordered that a mandate issue to the circuit court of the United States for the southern district of New York, directing that court to proceed in accordance herewith.

Notice of settlement waived.

HENRY C. WILLCOX,
Attorney for Plaintiff in Error.

——— ———,
Attorneys for Defendant in Error.

[Endorsed:] Action 2. Collins. Copy. Order of affirmance, &c.

286 Know all men by these presents that we, American Surety Company of New York, as principal, and Henry H. Cook, of No. 1 East 78th street, New York city, as surety, are held and firmly bound unto Frederick N. Pauly, as receiver of the California National Bank of San Diego, California, in the full and just sum of fifty-seven thousand dollars, to be paid to the said Frederick N. Pauly, as such receiver, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a United States circuit court of appeals for the second circuit, in a suit depending in said court between The American Surety Company of New York, plaintiff in error, and Frederick N. Pauly, as receiver of the California National Bank of San Diego, California, defendant in error (No. 2), a judgment was rendered against the said plaintiff in error, and the said plaintiff in error having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant in error, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said plaintiff in error shall prosecute said writ to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

287 AMERICAN SURETY COMPANY OF NEW YORK,
By W. L. TRENHOLM, *President.* [SEAL.]
H. H. COOK. [SEAL.]

Sealed and delivered in presence of—
J. W. MASON.

Approved:

R. W. PECKHAM,
Asso. Justice of the Supreme Court of the United States.

(Endorsed:) United States Supreme Court. American Surety Company of New York, plaintiff in error, against Frederick N. Pauly, as receiver of the California National Bank of San Diego, California, defendant in error. Action No. 2. Writ of error bond, $57,000.00. Henry C. Willcox, attorney for plaintiff in error, 100 Broadway, New York city, N. Y.: Defendant in error approves of the within bond as to form and sufficiency thereof and the sufficiency of the surety thereupon. Dated New York, April 8th, 1896. Frederick N. Pauly, defendant in error, by Edward Winslow Paige, counsel. United States circuit court of appeals, second circuit. Filed Apr. 16, 1896. James C. Reed, clerk.

288 (No. 2.)

UNITED STATES OF AMERICA, *ss:*

To Frederick N. Pauly, as receiver of the California National Bank of San Diego, California, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein The American Surety Company of New York is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this thirteenth day of April, in the year of our Lord one thousand eight hundred and ninety-six.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

289 Frederick N. Pauly, as receiver of the California National Bank of San Diego, California, hereby acknowledges due and sufficient personal service of the within citation this 17th day of April, 1896.

FREDERICK N. PAULY,
As Receiver of the California National Bank of San Diego, California,
By GEO. M. COFFIN,
Deputy and Acting Comptroller of Currency.
——— ———, *Attorney, and*
By EDWARD MITCHELL, *Attorney.*

[Endorsed:] United States circuit court of appeals, second circuit. Filed Apr. 16, 1896. James C. Reed, clerk.

Endorsed on cover: Case No. 16,280. United States circuit cour of appeals, second circuit. Term No., 169. The American Surety Company of New York, plaintiff in error, *vs.* Frederick N. Pauly as receiver of the California National Bank of San Diego, California (No. 2.) Filed May 2d, 1896.

No. 169.

Brief of Davidge, Willcox & Davidge for P. E.

Office Supreme Court
FILED,
DEC 15 1897
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Dec. 15, 1897.

AMERICAN SURETY COMPANY OF NEW YORK,
PLAINTIFF IN ERROR,

vs.

FREDERICK N. PAULY, RECEIVER, &C.,
DEFENDANT IN ERROR.

No. 169.

BRIEF FOR PLAINTIFF IN ERROR.

W. D. DAVIDGE,
HENRY C. WILLCOX,
W. D. DAVIDGE, JR.,
For Plaintiff in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

AMERICAN SURETY COMPANY OF NEW YORK,
PLAINTIFF IN ERROR,
v.
FREDERICK N. PAULY,
RECEIVER.
No. 169.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was commenced in the United States Circuit Court for the Southern District of New York on the 8th of May 1893, by Frederick N. Pauly, as receiver, the defendant in error, against the American Surety Company of New York, the plaintiff in error. (R. 5.)

The plaintiff below sued as receiver of the California National Bank of San Diego, California, to recover the

amount of a bond or contract for $25,000, issued by the Surety Company on the 1st of July, 1891, for the fidelity of the then president of that bank, one John W. Collins. By the terms of the contract the Surety Company undertook to answer for loss, by "fraud or dishonesty," of Collins. (R. 12.) It is set out at pages 11-16 of the record.

The obligation of the Surety Company was to make good and reimburse to the bank any pecuniary loss sustained by the bank by any act of fraud or dishonesty on the part of Collins in connection with the duties of his office. (R. 12.)

This obligation was, however, subject to the following conditions:

[1] "That the company shall be notified in writing, at its office in the city of New York, of any act on the part of the employee, which *may involve* a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer.

[2] "That any claim made in respect of this bond shall be in writing, addressed to the company, as aforesaid, as soon as practicable after the discovery of any loss for which the company is responsible hereunder, and within six months after the expiration or cancellation of this bond as aforesaid. And upon the making of such claim this bond shall wholly cease and determine as regards any liability for any act or omission of the employee committed subsequent to the making of such claim, and shall be surrendered to the company on payment of such claim.

* * * * * * * *

[3] "That if the company shall so elect, this bond may be cancelled at any time by giving one month's notice to the employer, and refunding the premium paid, less a *pro rata* part thereof for the time said bond shall have been in force, remaining liable for all or any default covered by this bond, which may have been committed by the employee, up to the date of such determination, and discovered and notified

to the company within the limit of time hereinbefore provided for.

[4] "That the employer shall, if required by the company, and as soon thereafter as it can reasonably be done, give all such aid and information as may be possible (at the cost and expense of the company), for the purpose of prosecuting and bringing the employee to justice, or for aiding the company in suing for and making effort to obtain reimbursement by the employee or his estate, of any moneys which the company shall have paid or become liable to pay by virtue of this bond.

* * * * * * * *

[5] "That no one of the above conditions, or of the provisions contained in this bond, shall be deemed to have been waived by or on behalf of the said company, unless the waiver be clearly expressed in writing, over the signatures of its president and its secretary, and its seal thereto affixed." (R. 13, 14, 15.)

The California National Bank of San Diego was organized in 1887, and commenced business in 1888. (R. 69.) In January, 1891, Collins, who had been cashier from the organization of the bank, became its president, and one George N. O'Brien, who had been a clerk, was appointed cashier. (R. 53.) On the application of Collins to the Surety Company the bond in question was given (R. 12), the limit of the liability being $25,000. (R. 14.)

On October 12, 1891, Collins was in New York city, and effected a loan from the Western National Bank of that city to the California Bank of $20,000. This loan was made on a note of the California Bank for $20,000, and on the security of promissory notes, the property of the California Bank, amounting to $36,250. The proceeds of the loan were credited by the Western National Bank to the California Bank, and subsequently drawn out by it. The loan was to the bank and not to Collins individually. (R. 78–81.) On the 13th of October, 1891, O'Brien, the cashier of

the California Bank, made out, in his own handwriting (R. 62), the deposit slip or tag marked Plaintiff's Exhibit No. 4, and set out at page 147 of the record, and on the same day the $20,000 on the deposit slip was entered by the bookkeeper of the California Bank to the credit of Collins' account in the ledger of the bank. (R. 63.) The $20,000 credit in the account is marked in the ledger "Western National." (R. 57.)

On the 12th of October, 1891, at the instance of Collins, the United States National Bank of New York city rediscounted for the California Bank two of their bills discounted, and placed the proceeds of the same to the credit of the California Bank. (R. 81.) The amount of the proceeds passed to its credit was $7,595.27. (R. 81.) On the 13th of October, 1891, the United States National Bank discounted the note of the California Bank for $17,500, and placed the proceeds to the credit of the California Bank. (R. 81.) The amount of both credits was checked out by the California Bank in the regular course of business. (R. 81.) Both credits were given by the United States National Bank to the California Bank, and not to Collins individually. (R. 81.) On the 13th of October, 1891, O'Brien made out, in his own handwriting (R. 63), the deposit slip or tag marked Exhibit No. 3, set out at page 147 of the record, and on the same day the $24,500 on the deposit slip was entered by the bookkeeper of the California Bank to the credit of Collins' account. (R. 63.) The $24,500 credit in the account is marked in the ledger "U. S. National." (R. 57.)

In each of the above transactions the proper entries to have been made upon the books of the California Bank by O'Brien were as follows: The $20,000 loan from the Western National Bank should have been placed to the credit of "bills payable" and charged to the Western National Bank. The actual entries are a charge to the

Western National Bank of $20,000, and a credit to the account of Collins of $20,000; "bills payable" is not credited with $20,000. The $24,500 loan from the United States National Bank should have been entered upon the books of the California Bank in the same way. There are no such entries. The actual entry is a charge to the United States National Bank of $24,500 and a credit of $24,500 to Collins individually. (R., 92, 93.)

It thus appeared that as a result of O'Brien's acts in filling up the deposit tags with statements which were apparently false, Collins's account with the bank was increased in his favor in the amount of $44,500. There was also another item in the account of Collins for $500 obtained from the United States National Bank in the same way, making in all $45,000 which appeared on the books of the California Bank to the credit of Collins. (R. 63, 147, 92.)

In the plaintiff's bill of particulars a number of other items were set forth, but under the ruling of the trial judge only these of the 13th and 14th of October were allowed to remain in the case, and it is only these that we have to consider. (R. 134.)

When the bank suspended payment, on the 12th of November, 1891, there was standing to his credit only $11,420.90. (R. 56.) This sum, deducted from the $45,000 credited, would leave a loss to the bank of $33,579.10.

There was also evidence that while before the date of the bond the account of Collins at all times showed a balance to his credit, he was, in fact, largely indebted to the bank by means of other similar apparently false entries which O'Brien had caused to be made.

The Surety Company, at the time it made the bond which is the subject of this suit, made a similar one in the sum of $15,000 to indemnify the bank against the misconduct of

O'Brien, the judgment on which latter bond is before this court for review—No. 168 at the present term.

The bank suspended payment on the 12th of November, 1891, and possession of its assets was taken by the bank examiner. (R. 38.) On the 18th of December, 1891, Pauly, the defendant in error, was appointed (R. 6), and, on the 29th of that month, qualified as receiver and took possession of the assets, books, and papers. (R. 38, 39.)

The bank, notwithstanding the fact that it had notice by means of the deposit tags and entries, as above mentioned, wholly failed to give the Surety Company the notice required by the first condition of the contract, "of any *act* on the part of the employee which *may involve* a loss for which the company is responsible hereunder as soon as practicable after the occurrence of such act shall come to the knowledge of the employer." (R. 13.)

The receiver also having, as he admits, knowledge of these acts of Collins and O'Brien, and being aware, as he swears, of acts that might involve a loss under the bond certainly as early as March, 1892 (R. 124), likewise failed to give the required notice to the company until the 1st of July, 1892, when he submitted to the company his proof of loss, notifying the company of these and other similar acts. (R. 57, 143–146.)

At the trial a letter from the receiver to the Surety Company, dated May 23, 1892, was given in evidence. (R. 89, 90.) It is set out in the record at page 166, marked Exhibit No. 24. The letter is nothing more than the general assertion of loss, and a request for blanks, so as to make claim for the loss in proper form; yet it was treated by the trial court as a compliance with the provision of the bond, requiring notice of any act of Collins which *might* involve a loss, and the court actually charged the jury that when the receiver became "satisfied" that

Collins had committed some specific act of fraud and dishonesty which might involve the Surety Company in loss, the letter of May 23d was a sufficient notice of such act. (R. 138.)

The letter is here set out in full in order that the court may see how far it is or ever was intended to be a compliance with the first condition:

"SAN DIEGO, CAL., *May 23rd*, 1892.

"AMERICAN SURETY COMPANY,
"160 *Broadway, New York, N. Y.*

"DEAR SIR: I write to notify you that the California National Bank held a bond to the amount of $20,000.00 in its favor for the faithful performance of duties by J. W. Collins, its late president, also in favor for the faithful performance of duties by Geo. N. O'Brien, its cashier, for $15,000.00. I therefore notify you that a discovery of fraud has been made of sufficient amount to require the payment of those indemnity bonds to the undersigned receiver of the California National Bank.

"I therefore ask that you forward us the necessary blanks to make the claim or claims in proper form.

"Respectfully, yours,
"FREDERICK N. PAULY,
"*Receiver.*" (R. 166).

Here are no acts notified, nor is the letter anything more than the general assertion of loss and a request for blanks, so as to make claim for the loss in proper form.

It is proper here to state that on an examination of the record it will be found that the receiver appears at no time to have recognized the duty of giving the notice required by the above condition, but to have supposed that the only notice to which the Surety Company was entitled was the claim for payment.

At the trial the question arose as to the proper construction of the condition of the contract requiring notice of

"any act on the part of the employee that may involve loss," or what is the same thing, *may* involve fraud or dishonesty.

In behalf of the Surety Company, it was contended that the duty to give such notice arose when any act of the employee, known to the employer, imported to any reasonable mind fraud or dishonesty, and hence might involve loss. On the contrary, it was contended on behalf of the receiver that the duty to notify did not arise until, on investigation, the employer had become "satisfied," or convinced, that fraud or dishonesty actually existed, and that any degree of suspicion, no matter how well founded, or well calculated to govern the action of a reasonable mind, did not give rise to the duty to notify. This question was determined by the trial court against the Surety Company. (R. 138.)

Another question determined by the trial court was whether or not what was "as soon as practicable" was to be determined by the jury. The court left that question to the jury (R. 138), whereas it was a question for the court to determine.

Although the duty of the receiver, as defined by the court, was made to depend on the discovery of acts of actual fraud or dishonesty, it was still necessary that he should give notice to the company "as soon as practicable" after discovery. No notice was, in fact, given of such acts until the claim or proof of loss, dated June 24, 1892, and received by the company July 1, 1892, was made. (R. 57; Exhibit 1, R. 143–146.)

By the contract it is provided that the statement of loss, based upon the accounts of the employer, shall be *prima facie* evidence. (R. 12, 13.) The trial judge held that this provision, which evidently referred to the consideration of the claim of loss by the company, did not stop there, but that in the event of the rejection of the claim of loss and a

subsequent suit against the company it worked a *prima facie presumption of the right to recover* in such suit, throwing the burden of proof upon the company. This ruling excepted to (R. 141) was affirmed by the Court of Appeals. (R. 279, 280.)

At the trial it was in evidence that the bond was obtained from the company by misrepresentations and fraud on the part of Collins. (R. 244.)

Other rulings were made at the trial principally as to the admission of evidence. These, so far as here insisted on, will appear in the assignment of errors.

Verdict and judgment for the plaintiff below. (R. 142, 150.) Affirmed on appeal. (R. 280.)

The bill of exceptions contains all the evidence in the case. (R. 252.)

ASSIGNMENT OF ERRORS.

There was error—

1. In the refusal to charge that, by the true construction of the contract, it was the duty of the bank, or receiver, to notify the Surety Company of any act on the part of Collins which, reasonably considered, *might* involve fraud or dishonesty in his office as soon as practicable after such act came to the knowledge of the bank or receiver. (R. 116, 125; 8th Request, R. 126); and in charging: "Now, it was not incumbent upon the plaintiff to give notice as soon as practicable after he may have had suspicions of dishonest conduct on the part of the president, but it was his duty when he became *satisfied* that the president had committed some specific act of fraud or dishonesty which was likely to

involve the defendant in loss to give notice in writing. * * * The notice in this case was given on the 23d of May, 1892, and it will become necessary for you to inquire and determine when it was that knowledge came to the plaintiff, when he became chargeable with knowledge that the president had committed some specific act of fraud or dishonesty likely to render the defendant liable upon its bond." (R. 138.)

2. In refusing to rule that, whatever the predicate of the duty to notify, whether as ruled by the court or claimed in behalf of the company, the company was not, as matter of law, "notified as soon as practicable of acts which might involve a loss." (R. 116, 125.)

3. In refusing to give proper instructions to enable the jury to decide the question of "as soon as practicable," as requested in behalf of the company as follows:

"If the jury find from the evidence that, on or before the 1st day of February, 1892, Mr. Pauly knew of any act of Collins which *might* involve a loss to the Surety Company under the bond in suit, then they must find a verdict for the Surety Company." (R. 126, 9th request to charge.)

"If the jury find upon the evidence that, on or before the 1st day of March, 1892, Mr. Pauly knew of any act of Collins which *might* involve a loss to the Surety Company under the bond in suit, then they must find a verdict for the Surety Company." (R. 127, 10th request to charge.)

"If the jury find upon the evidence that, on or before the 1st day of April, 1892, Mr. Pauly knew of any act of Collins which *might* involve a loss to the Surety Company under the bond in suit, then they must find a verdict for the Surety Company." (R. 127, 11th request to charge.)

If the jury find upon the evidence that, on or before the 1st day of May, 1892, Mr. Pauly knew of any act of Collins which *might* involve a loss to the Surety Company under the bond in suit, then they must find a verdict for

the Surety Company." (R. 127, 12th request to charge; (exceptions for refusing requests to charge, R. 141.)

4. In refusing the motion to dismiss the complaint on the ground that the receiver had not shown that a "proof of claim was served as soon as practicable after actual discovery of the loss, nor within six months after ex piration or cancellation of the bond." (R. 116, 125; exception, R. 117.)

5. In charging that, by the proper construction of the contract (R. 12, 13), the written statement of loss is made *prima facie* evidence of the right to recover in the action. (R. 135, 137; exception, R. 141.)

6. In charging that any written statement of loss based upon the accounts of the employer as provided by the contract was delivered to the Surety Company. (R. 135, 137; exception, R. 141.)

In respect of the last two assignments the court charged: "Now there is a provision in the policy to the effect that a written statement of loss certified by the duly authorized officer or representative of the employer (receiver of the bank in this case) and based upon the accounts of the employer, shall be *prima facie* evidence thereof. In view of that condition of the policy I instruct you that the plaintiff has established a *prima facie* case against the defendant because he gave the written statement of loss, and subsequently transmitted to the defendant a copy of the account upon which it was based. (R. 135; exception, R. 141.)

"Well, as I have said before, the plaintiff has made a *prima facie* case upon this issue [fraud or dishonesty] because he has complied with that condition of the policy which prescribes that a written statement of claim shall be

12. In refusing to charge:

"Even if the jury find that the credits of $25,000 and $20,000, for which the plaintiff seeks to recover, were fraudulently and dishonestly obtained by Collins, that alone does not make out the plaintiff's claim. He must show a loss resulted from these credits, and, in considering this latter question, the jury must not regard the alleged earlier false credits that have been given in evidence. *These earlier credits have no legitimate bearing upon the question of loss from the later ones.*" (R. 130; Exception 141.)

13. In refusing to charge:

"The jury cannot infer fraud or dishonesty upon Collins's part, in regard to any item here claimed, upon the theory that Collins was heavily indebted to the bank outside of such item or items. There is no legal or sufficient evidence that Collins was ever so indebted to the bank in any considerable amount." (R. 130; Exception, R. 141.)

POINTS AND ARGUMENT.

The facts in this case are similar to those in No. 168 at this term between the same parties, in which the questions of law relied on as error have been so fully argued, as to render much discussion here unnecessary.

POINT I.

The Duty to Notify the Surety Company as Soon as Practicable of any Act which May Involve Loss.

Both courts below held that the duty to notify was mandatory, and a condition precedent, failure to comply with which was fatal to recovery.

Both courts also held that the receiver, succeeding to the obligation of the company, took it *cum onere*, and was bound by the condition to notify.

These matters out of the way, it is proposed, briefly, to discuss, first, the *duty*, and, secondly, *whether it arose and was discharged.*

1. *The Duty.*

This is plainly a matter of construction. The parties competent to contract have made their contract, and the only question is what it means. It will be borne in mind that the contract relates exclusively to the relation of master and servant, employer and employee, the company undertaking to guaranty the fidelity of the president of the bank subject to the conditions of the contract.

First, the terms of the contract. They are perfectly plain.

The thing to be notified is the act—any act that *may* involve loss, not any act that *must* involve such loss. The duty depends exclusively upon the character of the act. It must be an act that may involve loss. As nothing but fraud or dishonesty can under the contract involve loss, the act must be such as *may* involve fraud or dishonesty. The act need not be in itself fraud or dishonesty ; it is sufficient if it may involve fraud or dishonesty.

What is the knowledge which is the postulate of duty ? Not knowledge of actual fraud or dishonesty but knowledge of any act that *may* involve fraud or dishonesty.

What is the act in the present case ? It is, in brief, the act of Collins appropriating to his own use the money of the bank through O'Brien, by means of false deposit tags and entries.

Is such an act one that *may* involve fraud or dishonesty ? It seems there can be but one answer.

Of course an act importing fraud or dishonesty may not be in fact what it imports. That, however, is not the question, but on the contrary the question is whether the act may be what it imports to be and hence *may* involve loss.

The duty depends upon the character of the act known to the employer and the natural and ordinary relations and consequences of such an act and how far in common experience it is consistent with the integrity of the employee. The theory of the courts below is that while an act, judged by any reasonable mind, may involve fraud or dishonesty, and hence loss, yet there was no duty to notify the guarantor until the employer, after investigation, has become satisfied of actual fraud or dishonesty. But the contract says that any act that *may* involve fraud or dishonesty shall be notified, not that it shall be investigated and then notified, or not, according to the conclusion reached by the employer.

The Surety Company contracted for notice of the act itself, not for its trial and determination by the employer and notice of the conclusion. The company was entirely competent to investigate for itself, and hence stipulated to be notified of the act, that it might investigate, if in its judgment necessary.

Secondly, the manifest intention and purpose.

Is there anything unreasonable in requiring knowledge of acts that may involve loss to be notified to a party interested? No one will say there is.

Was it not wise and prudent to require by the contract that the same acts which, reasonably judged, would cause the employer to investigate, should be notified to the guarantor, equally interested in those acts?

Again, the contract shows on its face *why* acts that might involve fraud or dishonesty were to be notified. The guarantor reserved the right to cancel the contract. (R. 14.) It

also bound the employer to co-operate with the company for the latter's protection, if required by the company to do so. (R. 14.)

How could these rights, the conditions of the obligation, be made available if the company was not promptly notified of acts which, to a reasonable mind, might involve fraud, but had to wait until an employer confessedly, confronted with such acts, had reached a conclusion as to actual fraud or dishonesty?

The courts below seem to consider that in the matter under discussion there can be only two states of the human mind—a state of "suspicion," in its narrow sense, where guilt is inferred from slight evidence, or no evidence at all, and a state of "satisfaction," or conviction of guilt. Acting upon this theory, they made "satisfaction" the standard of the duty to notify. Now, it is submitted, there is another state of mind between the above extremes, and universally recognized in human affairs, and that is the state where a reasonable mind, knowing an act and reasonably judging it, discovers that it may involve fraud or dishonesty. Such and no more is the standard of duty enacted by the contract.

The construction of the courts below practically nullifies the first provision of this bond, as to notice of any act that may involve fraud or dishonesty. The second provision, relating to claim of loss, necessarily involves acts of actual fraud or dishonesty. And yet the parties meant something by the first provision. What they meant is perfectly plain. By the first provision the company was, for its protection, to be notified of any act that might reasonably involve fraud or dishonesty. By the second the act, or acts, in fact, involving fraud or dishonesty were to be certified as part of the claim.

2. *Did the duty as here defined arise, and was it discharged?*

These are questions of fact, to be tried by a jury. They have not yet been tried.

a. Did the duty arise?

The evidence is simply overwhelming. Passing by the knowledge of the bank, to be implied from the false entries in the deposit tags and books, what is the evidence of the receiver himself?

He does not even deny knowledge of the above entries, nor that to his mind they might, and, indeed, did, involve fraud and dishonesty. He commenced an examination of the affairs of the bank immediately after he took possession (December 29, 1891). (R. 38–39, 124.)

He distinctly swears that he discovered the acts of fraud and dishonesty in February and March, 1892. (R. 124.) On January 27, 1892, he sent his report to the Comptroller of the Currency, including these items of the 13th and 14th of October, 1891. (R. 122, 123.) When he took possession, December 29, 1891, all the papers, including the books, checks, deposit tags, etc., upon which his case is based, were turned over to him. (R. 60, 61.) In the proof of claim he swears that on December 18, 1891, he was appointed receiver of the bank, and that immediately thereafter, "being advised that J. W. Collins, the then president of said association, was thought to be short in his accounts, and believed to have embezzled and misapplied funds of said association," etc. (R. 143.) On March 5, 1892, the Western National verified its proof of claim, which included one of the items making up this sum of $45,000. March 28, 1892, the receiver rejected the claims. (R. 236.)

His sense of duty led him to employ experts to examine the books of the bank so as to ascertain particulars and the extent of the loss. (R. 143.)

It must be clear that if the duty be as here defined, the receiver, unless phenomenally constructed, knew of acts that, reasonably judged and, indeed, as actually judged, by him, might involve fraud or dishonesty.

b. Was the duty discharged?

There is the same overwhelming evidence that it was not. There can be no pretence that if the duty be as here contended the company was not notified "as soon as practicable." The trial judge in his charge holding the duty to arise only when the discovery of actual fraud or dishonesty had been made by the receiver, ruled that any notice given as long as twenty-two days after discovery would not, as matter of law, be "as soon as practicable." (R. 139.) Apply that rule to the duty, not as erroneously defined by the court, but as plainly shown by the contract.

If the time in the charge is too short, or even if the question of "as soon as practicable" is not for the court but the jury, under proper instructions, still it follows that the company is entitled to a trial under a correct definition of the duty.

Indeed it is not saying too much to assert that the receiver, so far from discharging the duty, does not appear to have recognized its existence. He had two duties to discharge: one to give the notice of any act or acts, and the other to make the claim; the former a duty to the company, the latter to creditors and stockholders. Whilst active in the discharge of the latter, he seems to have had no conception of the former. He acted throughout as if the former were not in the contract, but the only duty was to make the claim of loss under the second condition. The claim of loss was not sent until June 24, 1892, and not received by the company until January 1, 1892. Hence the claim of loss would not in law be a compliance with the

duty to give the notice of acts even as that duty is defined by the court. The time between discovery and notice would not in law be "as soon as practicable" as charged by the court.

In this state of things, it was charged that as matter of law the letter of the 23d of May, 1892, operated as the notice. That letter, if examined, will be found to be in no sense a notice in pursuance of the duty even as that duty is defined by the court. It is simply a letter not referring to any act or acts of fraud or dishonesty, but stating generally that fraud has been committed so as to require the amounts guaranteed to be paid and asking for blanks to enable a claim of loss to be made in proper form. If such a letter be a compliance with the condition requiring the notice as defined by the court, such provision had as well be obliterated, for it can afford no possible protection to the company. The company is as much in the dark after the so-called notice as it was before. Even assuming, however, that the letter would be in law sufficient, according to the court's construction of the duty, no one can pretend that if the duty be as contended in this brief, the letter could be a fulfilment of it. Under the limit of time fixed by the charge as respects "as soon as practicable," it would manifestly be too late, for it is not open to controversy that the knowledge of acts that might, reasonably judged, involve fraud or dishonesty preceded by several months the discovery of actual fraud and dishonesty. At any rate, that question would be one of fact and for the jury.

POINT II.

IT WAS ERROR TO CHARGE THAT THE WRITTEN STATEMENT OF LOSS, FOLLOWED BY A COPY OF THE ACCOUNT UPON WHICH IT WAS BASED, CREATED A PRIMA FACIE PRESUMPTION THAT THE PLAINTIFF WAS ENTITLED TO RECOVER.

The theory of the court is based upon the following provisions of the contract:

"The company shall, within three months after notice, accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse," &c. (R. 12, folio 29.)

"It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer and based upon the accounts of the employer, shall be *prima facie* evidence thereof." (R. 12, 13, folio 30.)

"That any claim made in respect of this bond shall be in writing, addressed to the company as aforesaid as soon as practicable after the discovery of any loss for which the company is responsible hereunder." (R. 13, folio 33.)

It must be manifest that these provisions relate exclusively to the presentation of the claim to the company and the action of the latter thereon, and have not the remotest reference to a suit subsequently brought for the recovery of the alleged loss.

The company was willing in its consideration of the claim of loss to accept as *prima facie* evidence the statement duly certified and based upon the accounts of the employer instead of insisting on other proof.

The cardinal rule in the interpretation of contracts is the

intention of the parties as shown by the words, the subject-matter, and the object to be accomplished.

Now can it be asserted that, looking at these things, the parties intended anything more than to establish a reasonable rule in respect of the consideration of the claim by the company? Is it conceivable that the parties had any other intention?

Can it be supposed that they intended that an employer by making the statement, no matter how fraudulent or baseless, should be able thereby to deprive the company of its legal rights at all times and in all places, or that, in the event of the rejection of the claim of loss by the company for the best reasons, it might still be compelled to pay, not because the claim was just, but because of the alleged agreement?

The court will bear in mind that making the statement is the exclusive act of the employer, and in respect of it the company is utterly ignorant. Thus the penalty for *receiving* the statement of which it knows nothing is an admission of the alleged loss not only in respect of its consideration of the subject, but in any and all suits to which the rejection of the claim may give rise.

The Court of Appeals, affirming the ruling below on this subject, says:

"It [the contract] is *certainly open* to the construction put upon it by the trial judge; such construction is a *most natural* one; nor is there anything *extraordinary or startling* in an agreement by the company that it will pay *upon proof in a prescribed form* being made to it, nor in its agreeing to accept such proof as *prima facie* sufficient to entitle the insured to a recovery in case of default. Conceding that it is *also open* to a construction which would confine it as plaintiff in error contends, it would be at least ambiguous, and it is elementary law that all obscurities and ambiguities in a policy of insurance are to be resolved against the underwriter who has himself drafted the instrument."

It is submitted that the present, like any other contract, ought to receive a fair and reasonable interpretation; that the terms are plain, and that read by the subject-matter and manifest intention and object of the parties there is no ambiguity and that any ambiguity is only created by disregarding such subject-matter, intention, and object.

It does not clearly appear from the opinion of the Court of Appeals that that court recognized the full import and meaning of the ruling below. That ruling went to the extent that there was a *prima facie* presumption as to every element necessary to maintain the action—that the receiver had nothing to do at the trial but to give in evidence the statement, and was then entitled to recover unless the presumption was controverted by evidence given by the company. Thus the company was subjected to the *prima facie* presumption in respect of every element—notice, fraud or dishonesty and what not that entered into the right to recover.

Even if the *prima facie* presumption could have any application to a subsequent trial, which is denied, it does not admit of the forced construction put upon it by the trial judge. The statement which is to be *prima facie* is a statement "of such *loss* certified, &c., and *based upon the accounts of the employer*. Now, can anything be clearer that what the parties contemplated was that the statement transmitted to the company should be *prima facie* evidence of the *amount* or *extent of pecuniary loss* alleged? Surely such, and such only, was intended.

The ruling, however, instead of stopping here, makes the *prima facie* presumption extend to and comprehend every element of law and fact entering into the right to recover. The ruling makes the legal effect of the statement practically a confession of judgment subject only to the privilege of avoiding judgment by proving *negatives*—that is, there

was no fraud or dishonesty, actual loss, no notice, no pecuniary loss as alleged, &c.

It is worthy of observation that by the contract the statement is required to be "based on the *accounts* of the employer." (R. 12, 13.) The account of Collins with the bank is set out at R. 223–228. This account was never sent to the company. A so-called account was sent July 18, 1892 (R. 174; Exhibit 39, R. 181), nearly a month after the claim of loss. This latter consists simply of a paper showing the reconstruction and manipulation of the book account by the receiver and his aid Bloodgood, the result of which was to swell the account so as to show a balance against Collins of $374,978.22. (R. 110, 111.)

Thus we have an illustration of the doctrine of *prima facie* presumption laid down by the court. It gives *prima facie* force and effect in respect of law and fact to anything the employer may think fit to claim.

POINT III.

THE QUESTION OF WHETHER NOTICE OF ACTS THAT MIGHT INVOLVE LOSS WAS GIVEN AS SOON AS PRACTICABLE, WAS FOR THE COURT.

The ground upon which it was left to the jury was the erroneous assumption that the letter of May 23, 1892, was as matter of law the notice required (R. 138), but this letter, the construction of which is for the court, is manifestly not the notice required, nor was it intended to be such.

Apart from the letter there is no pretence of notice except by the claim of loss, dated June 24, 1892, and received

by the company July 1, 1892, and even if such claim can be made to operate as such notice, it would be too late, as ruled by the trial judge in his charge. (R. 139.)

POINT IV.

THE CLAIM OF LOSS WAS NOT GIVEN TO THE SURETY COMPANY WITHIN THE LIMIT OF TIME PROVIDED.

By the contract the company agrees, three months after notice accompanied by satisfactory proof of loss has been given, to make good and reimburse. (R. 12.) This notice "shall be in writing, addressed to the company, as aforesaid, *as soon as practicable* after the discovery of any loss for which the company is responsible hereunder, and *within six months* after the expiration or cancellation of this bond as aforesaid." (R. 13.)

The bond expired by its limitation of one year and also by the "death, dismissal, or retirement of the employee from the service of the employer;" and, within six months thereafter, the claim of loss was required to be made. (R. 12, 13.)

The bank suspended on the 12th of November, 1891. The receiver was appointed on the 18th of December and qualified and took possession on the 29th of that month. (R. 124.)

Collins ceased to act as president on the 12th of November, 1891. This is the sworn statement of the receiver and indeed is the only evidence on this point in the case. (R. 124.)

The claim of loss accompanied by proofs, dated the 24th of June, 1892, was not received by the company until the

1st of July, 1892. (R. 57.) Thus it plainly appears that more than six months elapsed before claim of loss was given.

It needs no argument to show that the limit of time fixed by contract could not be extended save by mutual consent especially in the case of a surety, nor that if it could the evidence afforded any pretext for the jury to absolve the receiver from the contract.

All the evidence as to the dismissal or retirement of the employee was the evidence of the receiver himself, that—

"The following is the date of the dismissal or retirement of said John W. Collins * * *

"The said J. W. Collins ceased to act as president of the said California National Bank upon the same going into insolvency and coming into the possession of the Comptroller of the Currency of the United States, which took place December 12, 1891." * * * (R. 124.)

POINT V.

ERRORS WERE COMMITTED IN THE ADMISSION OF EVIDENCE.

We cannot undertake to argue in detail the questions of evidence presented by the record. There are, indeed, but few that space will permit us even to notice:

1. The admission in evidence of Collins's ledger account, and of the teller's book, as it was called.

2. The admission of evidence as to alleged prior frauds.

3. The admission of evidence claimed to show the extent of Collins's indebtedness to the bank.

1. *The ledger account and the teller's book.*

Keeping in mind the theory of the plaintiff's case, that

the acts of fraud and dishonesty consisted in the false *credits* in Collins's account which he is alleged to have drawn out, how can *the entire account* be evidence against his surety?

It certainly could not of itself be evidence of anything. It does not prove itself. It is but a series of declarations by which the surety cannot be affected, much less bound. It would not be evidence even against O'Brien or Collins.

Rudd *v.* Robinson, 126 N. Y. 117.
Smith *v.* Rentz, 131 N. Y. 175–6.

And it certainly could not be evidence against the surety.

Hatch *v.* Elkins, 65 N. Y. 489.
Roe *v.* Beach, 76 N. Y. 168.

If not evidence, in and of itself, it never was made evidence by any further testimony. The rule requires entries to be proved by the person making them and having personal knowledge of the facts asserted by them. No rule is better settled than this; but no such testimony was given. The only witness put on the stand as to the ledger account testified that he had no personal knowledge of the transactions represented by the entries (R. 55), and did not even make all the entries. (R. 55.) But, in spite of our objections, he was allowed to read from the account as much as plaintiff desired (R. 56–58), and this account was *the only evidence* that Collins *ever drew out anything.* We submit that it was wholly insufficient.

The same considerations apply to the teller's book. R. 64.)

Admitting, however, that the books were evidence as against the Surety Company, if properly proved, the testimony was to the effect that the books did not contain a true account of the transactions of Collins with the bank.

Brimhall, the bookkeeper, testified that the account of Collins was used as a "clearing house" (R. 70); that his account was used for many transactions of the bank in which he had no interest (R. 71); that his account contained items not properly chargeable against him (R. 70); that his account was used for the purpose of getting a transaction off the books which had been placed there for the convenience of the bank (R. 71); that there were transactions in Collins's name for the benefit of the bank (R. 72); that to pass things into his account and out of his account that were really for the interest of the bank, and not Collins's, was an every-day transaction. (R. 71.)

Not only this, but after the suspension certain additional items were entered in the account. (R. 56.)

Indeed, in the plaintiff's own case the account must have been discredited, for the account shows and the bookkeeper testified (R. 51) that at the suspension of the bank Collins had a credit of $11,420.90. (R. 56.) It is only on the theory of Collins's indebtedness to the bank that it is made to appear that Collins drew out the $45,000 improperly placed to his credit. Moreover, if we take the two bonds together, one in this case for $25,000, and one in the O'Brien case for $15,000, No. 168 at this term, making $40,000 in all, and deduct from the alleged loss, $45,000, the credit in favor of Collins for $11,420.90, we have as a result $33,679.10, while the plaintiff sued for and recovered a judgment for the full amount of both bonds. It was only by discrediting the account that the plaintiff maintained his case. That is why he notified the company that Collins's account was overdrawn to the extent of $374,978.22. (R. 174, 181–209.)

2. *Evidence as to alleged prior frauds.*

Mention has been already made that plaintiff was allowed to prove alleged frauds prior to the date of our bond. There were many instances of this, one or two examples of which will be sufficient. On March 25, 1891, the Park Bank of New York loaned $25,000; and on June 10, 1891, $20,000 to the California Bank. (R. 75, 77.) These sums, it is claimed, were by deposit tags credited to Collins. (R. 75.) Even conceding that, for argument's sake, how could it properly affect the surety? Our bond was not given until July 1, 1891. (R. 11.) The urgency for it all is apparent. By the books of the bank—this very ledger account—Collins still had $11,420.90 to his credit when the bank closed its doors. To make out his case it was necessary for the receiver to strike out some of the credits, thus impeaching the account, and at the same time to insist that *the entries on the other side* were *per se* evidence, even against the surety, of Collins having drawn out money.

Now, we submit that all this was error. If these items are *not* necessary in proving that *during the life of our bond* Collins was allowed to draw out more money than was his right, then, however fraudulent it may have been, it was improper to admit it to our prejudice with the jury.

If they *were* necessary to the establishment of any loss, then the loss was one for which the surety was not liable. We did not undertake to answer for O'Brien's acts done before the bond was given.

Still further, even if we could in any way be *liable* under the bond for these alleged prior frauds, then we were *entitled*, under the bond, *to have them specified in the proof of loss.* This was not done. All these objections were taken, and the admission of the evidence was, we submit, error.

3. *The extent of Collins's indebtedness to the bank.*

The error in this was twofold.

a. Its amount had no legitimate bearing on the case.

The surety was only liable for "fraud and dishonesty," not for "indebtedness." The charge was "false entries," and improper certificates of deposit. If, on any particular day, Collins gave value to the bank, he was *entitled* to a credit to that amount or to a certificate of deposit, as he might elect, *no matter how much he then owed the bank.* The bank could not take his money save on his own terms. The only question, then, under the proof of loss, the complaint or the bill of particulars, was whether he did or did not give value in the case of the particular items on which a recovery was sought. His general indebtedness had nothing legitimately to do with that inquiry.

b. There was no competent evidence showing how much Collins did owe the bank, and incompetent evidence on that subject was admitted. The receiver claimed to have sent to the surety a certain account showing the true condition of affairs between Collins and the bank. (R. 174.) It was at last received in evidence. (R. 181.) It makes out Collins a debtor in $374,978.22. How did sending it to the surety make it competent evidence against the latter, that Collins owed the bank $374,978.22? The receiver relied on a phrase in the bond as to "*prima facie* evidence." (R. 12–13.) That clearly refers to a prior part of the bond, which says that the notice must be accompanied by "satisfactory proof of a loss, as hereinafter mentioned." (R. 12.) The bond, therefore, proceeds, later on, as promised, to say in what form this *preliminary* proof must be. The parties are not speaking of a possible subsequent trial of an action. No such contingency is in their minds.

Moreover, the statement which is to be "*prima facie* evidence" is a statement of the "loss," for which claim is made. It is not pretended that the receiver could, or ever did, claim $374,978.22 under the bond. This is a statement of Collins's alleged aggregate indebtedness to the bank, and not of the "loss" claimed from the surety. How, then, can it be evidence against the latter?

Surely it is idle to stop to argue that this remarkable document was not evidence against the surety, that Collins owed the bank $374,978.22, even if—which we have already disputed—that fact, legitimately proved, would have been competent. The surety did not agree that a statement of such composite parentage—not merely not "based" upon the employer's account, but assuming upon outside investigations to impeach them—should be evidence of anything against him.

An inspection of this statement and the testimony of the bookkeeper, Bloodgood, who made it up, shows that it presents the ideas of the receiver, his counsel, and his bookkeeper, rather than the facts (R. 110, 111); and that it is composed of items which they, in their judgment, thought best to charge against Collins, with the apparent purpose of making the account show as much as possible against Collins; and to that end utterly disregarded the account of Collins in the bank's books, which account shows that the bank owed Collins $11,420.90 on the date of its failure. (R. 56.) Thus the receiver takes the position on one hand that the books and Collins's account are correct and competent evidence against the surety, and on the other that the books are not correct, and that a statement of Collins's account may be made up from outside information, papers, &c., and, when so made up, will bind the surety and make out a "*prima facie*" *case* against the defendant and justify the jury being so instructed as well as that it is thereupon for the surety to "overcome that case."

In respect of other errors the Court is respectfully referred to the argument in the preceding case, No.168 of this term.

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

W. D. DAVIDGE,
HENRY C. WILLCOX,
W. D. DAVIDGE, JR.,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

NUMBER 169 OF OCTOBER TERM, 1897.

AMERICAN SURETY COMPANY,
Plaintiff in Error,

against

FREDERICK N. PAULY,
Defendant in Error.

Collins Case.

BRIEF FOR DEFENDANT IN ERROR.

Facts.

FIRST HEAD: *Condition and Nature of the Action.*

Writ of error to the Circuit Court of Appeals for the Second Circuit, bringing up a judgment of that court which affirmed a judgment of the Circuit Court for the Southern District of New York, a judgment for money entered upon a verdict of a jury, which had been rendered in favor of the plaintiff below.

The action was brought upon a paper writing under seal, called therein a "Bond," made by the

plaintiff in error, by which it bound itself to "make good and reimburse to the" California National Bank, "all and any pecuniary loss sustained by" it, "of moneys, securities, or other personal "property in the possession of" one John W. Collins, its president, "or for the possession of "which he is responsible, by any act of fraud, or "dishonesty, on" his "part, in connection with "the duties of the office or position hereinbe- "fore referred to," * * * * and "occurring "during the continuance of this Bond, and dis- "covered during said continuance, or within six "months thereafter, and within six months from "the death or dismissal, or retirement of" said Collins "from the service of the" employer. The paper writing also contained the following: "It "being understood that a written statement of "such loss, certified by the duly authorized officer "or representative of the Employer, and based "upon the accounts of the Employer, shall be "*prima facie* evidence thereof" (fols. 29–30).

Also the following:

"That the company shall be notified in writing "at its office, in the City of New York, of any "act on the part of the Employee, which may in- "volve a loss for which the Company is responsible "hereunder, as soon as practicable after the occur- "rence of such act shall have come to the knowl- "edge of the Employer. That any claim made in "respect of this Bond shall be in writing, addressed "to the Company, as aforesaid, as soon as practi- "cable after the discovery of any loss for which "the Company is responsible hereunder, and with- "in six months after the expiration or cancella- "tion of this Bond as aforesaid" (fols. 32–3).

It was also provided in this paper writing, that its term should be for twelve months, ending on the first day of July, 1892, at noon (fol. 29), and that the plaintiff in error should not be responsible under it to a greater amount than twenty-five thousand dollars (fol. 34).

The defendant in error is receiver of the concerns of the California National Bank.

An issue made by a complaint which alleged loss from acts of Collins insured against as above and an answer denying the same, was tried to a jury which rendered a verdict in favor of defendant in error for twenty-five thousand dollars, with interest from three months after notice had been given.

The judgment entered upon that verdict was affirmed by the Court of Appeals for the Second Circuit, and the judgment of the latter court is now brought here.

Second Head: *The Proofs.*

As to the acts of dishonesty and the loss.

On the morning of the thirteenth of October, 1891, John W. Collins, then and for a long time before president of the bank, owed the bank about three hundred thousand dollars—to be exact, $301,728.22.

This is got at from the proof as follows:

His indebtedness on the twelfth of November was $374,978.22 (fol. 621).

Less credits of 13 and 14 October (fols. 267–270)	$45,000	
Less other credits to 10 November (fol. 677)	$28,250	73,250.00
		$301,728.22

The Court should be informed that there are misprints in the dates of the two accounts printed on pages 181 to 209 and 223 to 228. On page 185 the date "1893" should be 1891. On pages 186, 187, 188, 189, 190 and 191, the six dates "1890" should be each 1889. On page 192 the first date "1890" should be 1889. On pages 185 and 186 the "1890" should be 1891. In other words, the account should run consecutively from 19 Jan. 1888, at page 181, to 10 November, 1891, at page 209. On the other account, on page 225 the

"1892" should be "February," and the "1893" should be "March." On page 226 the "1893" should be "March," the 1894 should be April, the 1895 should be "May" and the 1896 "June." On pages 227 and 281 the two dates "1887" should each be 1891. In other words the account should run consecutively from the first of November, 1890, on page 222, to January, 1892, on page 228. The mistake in the Collins account has come from the fact that the months are numbered in the original "2" for February, "3" for March, and so on, and the printer has prefixed "189" for March, and so on. All this appears by a glance at the original bill of exceptions.

This indebtedness consisted of (fols. 448–453):

1. Notes $57,697.37
2. Cheques not charged 75,616.25

$133,313.62

And the balance, mostly by crediting to Collins' private deposit account in the bank of moneys borrowed by the bank elsewhere, and *its* property, not *his*, under circumstances similar to those now to be narrated.

On the 12th of October, 1891, Collins, in New York, borrowed for the California National Bank of the Western National Bank, on paper of the California Bank, $20,000, and that amount was placed to the credit of the California National Bank in its deposit account in the Western National, and was afterwards chequed out by the California Bank (fols. 227–233, 464). On the thirteenth of October the cashier in San Diego made out a deposit slip to credit Collins $20,000, stating on the slip to be "Westn. Nat." (fols. 167, 435), the slip being in the cashier's handwriting (fol. 170). From this deposit slip, or "tag," as he called it, the bookkeeper posted into the ledger to Collins' credit in the latter's individual account the same amount of $20,000 (fols. 171, 155, 677). A telegram in cipher had previously on that day passed from Collins in New York to the cashier in San Diego (fol. 622).

On the 12th and 13th days of October Collins, in New York, borrowed for the California National Bank of the United States National Bank in New York, first, $7,595.27, on two rediscounted bills, which the California National Bank had discounted; and, secondly, $17,316.25 on the note of the California National with six of the latter's discounted bills as collateral. The total proceeds, $24,911.52, were placed to the credit of the California National in its deposit account in the United States National, and were afterwards chequed out by the former (fols. 234, 239, 468). On the 13th of October the cashier in San Diego made out a deposit slip to the credit of Collins for $24,500, writing on it "U. S. Nat., N. Y.," and on the 14th another for $500, writing on that "more U. S. Nat.," and those amounts were posted to Collins' credit in the latter's individual account in the California Bank, both deposit slips being in the cashier's handwriting (fols. 433, 434, 155, 166–172, 677). There was a telegram in cipher referring to one of these from Collins to the cashier on that day (fol. 623).

The above were the "acts of fraud or dishonesty" on the part of Collins which the court submitted to the jury. The plaintiff's claim was that Collins had deliberately put forty-five thousand dollars of the bank's money to his own credit, and then drew out the money.

As bearing upon his knowledge and intent the plaintiff gave evidence of the following transactions:

On the twenty-fifth of March, 1891, Collins borrowed for the California Bank of the Park Bank in New York twenty-five thousand dollars, which was placed to the credit of the California Bank in the Park Bank and chequed out by the former

(fols. 219–223, 245), and this amount was put to Collins' credit in the California Bank (fol. 454).

On the twenty-fifth of March, 1891, twenty thousand dollars was put to his credit which had been borrowed of the Union National of Chicago (fol. 625).

Prior to the twenty-first of April an arrangement to deceive the bank examiner had been made between the California Bank and the National Bank of Commerce of Kansas City, by which the latter bank was apparently to loan monies to the former, so that the books would show a deposit—but the California Bank was not to draw against it; under this arrangement a loan of twenty thousand dollars was made on the sixteenth of April, none of which, of course, was ever drawn by the California Bank (fols. 250–255); under color of this twenty thousand dollars was put to Collins' credit on the twenty-first of April, 1891 (fols. 273–274, 479).

On the second of May, 1891, forty thousand dollars was put to Collins' credit by simply making an "item"—that is, putting a piece of paper in the cash (fols. 455, 353–9).

On the twenty-fifth of May, 1891, the cashier made out to Collins three certificates of deposit—one for $10,000 and two for $7,500 each (fols. 475–478), and took Collins' cheque therefor (fol. 448), which cheque he did not charge to Collins' account (fol. 188). Collins used these certificates as collateral to effect a loan to the same amount, $25,000, from one Wood in Denver (fols. 240–245). The draft in which the proceeds were given to him he used in the Denver National Bank; $5,115.25 of it to pay a debt of his own, and the balance of $19,883.75 he put to the credit of the California National there (fols. 246–9). The above cheque (Exhibit 6)

stands therefore for an indebtedness of $5,116.25 only.

On the sixth of June, 1891, the cashier put to the credit of Collins in the California National $20,000, writing on the deposit slip, "By Teleg., Nat. Park Bk." (fol. 459), and this amount was posted to the credit of Collins in his individual account in the ledger (fol. 218). On the third of June Collins had effected a loan of that amount from the Park Bank to the California National upon a note of the latter bank (fol. 460), the proceeds of which had been placed to the credit of the bank in the Park Bank (fols. 224–5), and the California Bank drew out the money.

On the twentieth of July, 1891, the cashier gave Collins a certificate of deposit for $20,000, and took Collins' cheque therefor, which he never charged up against the latter (fols. 449, 189).

On the sixteenth of September, 1891, he gave Collins a certificate of deposit for $15,000 and took Collins' cheque therefor, which he never charged up against the latter (fol. 189).

On the twenty-second of September, 1891, he gave Collins two certificates of deposit for $7,500 and $8,500, for which Collins gave his cheque, which was never charged up against him (fol. 187).

Here were on the morning of the twelfth of October one hundred and twenty-five thousand dollars of false deposits, as follows:

25 March.....	$25,000
" "	20,000
21 April.....	20,000
2 May.....	40,000
6 June.....	20,000
	$125,000

and seventy-six thousand dollars of certificates of deposit, issued for nothing:

23 May.....	$10,000
" "	7,500
" "	7,500
20 July.....	20,000
16 Sept.....	15,000
22 Sept.....	7,500
" "	8,500
	$76,000

which we know of.

Here is a deliberate taking by Collins of two hundred and one thousand dollars of the bank's money, embracing twelve false transactions.

And it may be, that had the other deposit slips used upon the trial (fol. 218) been printed, other false deposits would appear.

No denial was made.

In addition to the above there are the transactions of the thirteenth and fourteenth October—$45,000—on which the Court sent us to the jury, and on the 31st October O'Brien put to Collins' credit $20,000, writing on the deposit slip

"Check 1st Chic.....	$10,000
" West Natl.....	10,000
	$20,000"

(fol. 677), and charged those two banks corresponding amounts; this was purely imaginary (fol. 325).

Collins drew out all of this money—the balance to his credit in his deposit account being on the eleventh November, when the bank closed, $10,420.90 (fol. 678), and against this there were two cheques to be charged amounting to $19,850, which

the bank examiner did afterwards charge (fols. 160, 678).

There is no doubt about this proof. Mr. Pauly, as early as the eighteenth of July, 1892, sent to the plaintiff in error a detailed account showing that Collins owed the bank when it closed $374,978.22 in his own name (fols. 514, 535–621), and claiming also that under the name of Dare and Collins he further owed the bank $348,703.52 (fol. 515). The expert Bloodgood swore to the fact. The plaintiff in error sent an expert accountant to San Diego in July, 1893, and August, 1894 (fol. 334). He was given full access to all the books (fol. 334). They put him upon the stand and he did not question one word of the foregoing (fol. 334), and in all their cross-examination of the expert Bloodgood they only questioned one item of $10,000 (fol. 325).

II.—*As to the Discovery, Notice and Claim.*

The assets of the bank were taken possession of by the bank examiner on the thirteenth of November, 1891. Mr. Pauly was qualified as receiver on the twenty-ninth of December, 1891.

The receiver notified the plaintiff of acts of fraud and dishonesty on the part of Collins on the twenty-third of May, 1892.

Mr. Pauly says that his discovery was made by the report to him of an expert by the name of Sparks (fols. 30–31, 297). Sparks was employed by him on the first of April, 1892—not before—(fols. 257–8), and continued until the first of June.

Mr. Bloodgood assisted him (fols. 257–8).

Some days before the twenty-third of May they discovered the acts of Collins of the thirteenth and fourteenth of October, as already given, and made

a written report about them to Mr. Pauly (fols. 257–260, 482–490).

He thereupon on the twenty-third of May wrote to the plaintiff in error that "a discovery of fraud "had been made of a sufficient amount to require "the payment of the" amount of the bond, and asking for a blank to prepare the claim (fol. 491). To this the plaintiff in error responded by the letter which is printed at folio 505—sending the blank. This letter was received by Mr. Pauly about the eighth or ninth of June. But without waiting for the reply Mr. Pauly had sent the detailed notice or claim on the thirty-first of May (fols. 492–504). On the twenty-fourth of June Mr. Pauly sent the letter printed at folio 695, enclosing the claim (fol. 596), and the notice (fol. 698). This was received by the plaintiff in error, and on the eighth of July it wrote to Mr. Pauly, acknowledging its receipt, not objecting to the proof of claim at all, but asking for full information as to the shortage and credits of both Collins and O'Brien (fol. 505). To this, on the eighteenth of July, Mr. Pauly responded, by sending the Collins account, given at folios 535–621 (fol. 514). Correspondence followed between the parties, continuing until the fourth of October (fols. 514–534), mainly relating to the going of an expert, whom the Surety Company intended to send to examine into the matters, and giving excuses why his going had been delayed. He had to go elsewhere upon its other matters, and had not got there as late as the fourth of October.

Mr. Pauly says in his proof of loss, which is made evidence by the contract (fols. 30–31) that, being advised that J. W. Collins was thought to have embezzled, etc., he employed an expert ac-

countant to enter upon an examination of the books of the bank. That "*such investigation*" showed the acts of Collins in question (fols. 497, 422).

This expert was Sparks (fol. 297).

Now, we know that he did not employ Sparks until the first of April, and that Sparks was in his employ until the first of June (fols. 257–8). The payments to Sparks show this beyond question. We also know the report of Sparks, in which Bloodgood joined, was not made to Mr. Pauly until a very few days before the twenty-third of May (fols. 259–260).

Sparks went to work April first, on Collins' account and with Bloodgood assisting him—they "worked all the time constantly, and worked hard" (fol. 257)—discovered the acts of Collins, on which we went to the jury in this action, some time in May (fol. 258). They embodied a description of those acts in a written report to Mr. Pauly, which they gave to him shortly before the twenty-third of May (fol. 260). This report is printed in the Transcript of the Record at fols. 482–490. It describes the acts in question at fols. 486–7.

The defendant below made a motion for a nonsuit and a motion that a verdict be directed in its favor It also took certain exceptions to the charge.

BRIEF OF THE ARGUMENT.

I.

The motion for a non-suit and the motion for the direction of a verdict were properly denied.

The grounds of these motions were substantially as follows:

1. *The alleged loss was not set forth in the proof of claim.*

This is based upon the idea that the "proof of claim" is a sort of pleading, and that there is a variance between that pleading and the proof.

One answer to this contention is that the "proof of claim" is not pleading, but *proof*.

The policy or bond contains the following (fols. 30–31): "It being understood that a written state-" ment of such loss, certified by the duly author-" ized officer or representative of the employer, " and based upon the accounts of the employer, " shall be *prima facie* evidence thereof."

The "proof of the claim" is, therefore, evidence, and, as the court told the jury, we could have put it in evidence and stopped, resting our case upon it. It is by the express provision of the contract *evidence* upon which a verdict will stand.

It follows that no matter how much other and variant evidence there may be, *we would have a right to go to the jury upon the difference in the proofs*. Upon this part of the case the questions must, by the express provision of the contract, always be questions of fact.

But there is not any variance.

The statement in the proof of claim is as follows:

"That on the 13th day of October, he, the said "J. W. Collins, obtained from the United States "National Bank of New York a loan of twenty-"five thousand dollars ($25,000), upon a note of "the California National Bank and by rediscount-"ing certain individual notes being of the assets "of said bank, *and took and applied said sum* "*of twenty-five thousand dollars to his individual* "*use, and embezzled said sum*" (fols. 425, 500).

Other evidence in the case tends to show that Collins effected a loan, as above stated; that the money was put to the credit of the California National in its account with the United States National; that Collins then sent a telegram to the cashier of the California National; that the cashier then put the twenty-five thousand dollars to Collins' credit in his individual account, writing on the deposit slip that the money was from the United States National Bank of New York, and Collins then chequed it out.

Surely here is no variance. It was the same money. The cashier's entry shows that it was the same money. The fact that it passed through the hands of the California National to get into Collins' hands does not make it any the less the same money, and he *did* appropriate it to his own use, and he *did* embezzle it. That it went to the credit of the California National, and then directly to *his* credit *in* that bank is but a *detail* of the embezzlement, and a showing of *the particular manner* in which he did appropriate it to his own use.

There is another answer to this point, which, though narrow and technical, is not any more narrow and technical than is the point itself. It is this:

The brief used by the plaintiff in error below, in stating this matter, after saying that the money thus borrowed had been put to the credit of the California National and drawn out "in the usual way," which is, of course, so—proceeds (pp. 16–17): "No testimony whatever was offered to show "that Collins had anything to do with drawing it "out. *The burden as to this being upon the plain-"tiff, it must be assumed that he did not.*"

On the contrary *there is* evidence. *There is the "proof of claim,"* which is evidence that Collins appropriated to his own use and embezzled *this very money.* If, in order to make out the appropriation and the embezzlement, it be necessary to show that Collins personally drew out the money, *then here is evidence that he did so.* There is none to the contrary and the verdict has determined that issue in our favor.

Indeed it is the most probable thing in the world that he did draw it out and send it to California to meet his cheques upon his individual credit. Since he was president of the bank he could easily have done this.

2. *The preliminary notice was not served, as required by the bond.*

3. *Neither the final notice nor the proof of loss, was served as required by the bond.*

4. *Assuming that some loss was proved, it would not be one within the terms of the bond.*

The first two matters will be considered together, since the notice and the claim were given and made together. The provision in the contract is in these words (fol. 33): "That the Company shall "be notified in writing, at its office in the City of "New York, of any act on the part of the Em- "ployee, which may involve a loss for which the "Company is responsible hereunder, *as soon as* "*practicable* after the occurrence of such act shall "have come to the *knowledge* of the Employer. "That any claim made in respect of this bond "shall be in writing, addressed to the Company, as "aforesaid, *as soon as practicable* after the *dis-* "*covery of any loss* for which the Company is "responsible hereunder."

What is "as soon as practicable" is a question of fact.

Angell, §§ 231, 233.

Insurance Co. *vs.* Stark, 6 Cranch, 273.

Cashau *vs.* N. W. Nat. Ins. Co., 5 Biss., 476.

O'Brien *vs.* Phœnix Ins. Co., 76 N. Y., 459.

Carpenter *vs.* G. A. Ins. Co., 135 N. Y., 389.

McNally *vs.* P. Ins. Co., 137 N. Y., 389.

Edwards *vs.* Baltimore Fire Ins. Co., 3 Gill, 176, 188.

People's Accident Assn. *vs.* Smith, 126 Penn. St., 317, 325.

In *Cashau* vs. *Northwestern Nat. Ins. Co.*, 5 Biss., 476, the contract was of reinsurance, and contained the following: "All persons having a

"claim under this policy shall proceed at once to "put the property in the best order, and give im- "mediate notice, and render a particular account "thereof in writing, under oath, stating the time, "origin and circumstances of the fire."

The fire occurred 9th October, 1871. The insurance company was made insolvent by the fire and a receiver was appointed and qualified 16th October, 1871. Proofs of loss were made by insured and served on the receiver 8th December, 1871.

On the 29th December, 1871, the receiver gave notice to the defendant that proofs of loss had been served upon him by the insured, and that he would hold the defendant liable. This was served on the president of defendant 29th December, 1871, and acknowledged by the secretary 4th January, 1872. On the 22d January, 1872, proofs of loss were served by the receiver on the defendant.

In a suit by an assignee of the receiver, the Court directed a verdict for plaintiff. On a motion for a new trial Mr. justice *Miller* refused to disturb the verdict, saying: "The word *immediate* "must mean a reasonable time under the circum- "stances" (p. 478).

It thus appears that the fire occurred on the ninth of October, 1871, and no notice of any kind was given to the insurance company until the twenty-ninth of December—a period of two months and twenty days. There was no excuse, except that the receiver was new to the business. That excuse can be urged here with equal force.

In *O'Brien* vs. *Phœnix Insurance Co.*, 76 N.Y., 459, the loss occurred the eighth of March, and the proofs were furnished the sixteenth of May—two months and eighth days.

In *Carpenter* vs. *G. A. Ins. Co.*, 135 N. Y., 298, the lapse of time was one hundred and fifteen days.

In *McNally* vs. *P. Ins. Co.*, 137 N. Y., 389, the policy provided that a certain certificate should be given "if required." The fire occurred seventh June, 1885. The certificate was "required" on the seventeenth of June, 1885. It was furnished seventh of June, 1886—ten days less than one year, and the court did not disturb the verdict of the jury.

In *Brink* vs. *Hanover Fire Ins. Co.*, 80 N. Y., 108, the court held the following question to be proper: "Q. So far as you could individually did "you get those proofs of loss forwarded as soon as "it was possible for you to do so?" In this case the policy required the proofs to be forwarded as "soon as possible." The fire occurred on the twenty-third of November. The proofs were prepared by one of the plaintiffs and forwarded to the other on the seventh of the following January, and they were given by the latter to the insurance company on the seventh of February.

Evidence was as follows:

The bank examiner took possession of the assets of the bank on the twelfth of November, 1891.

Mr. Pauly qualified as receiver on the twenty-ninth of December, 1891.

Mr. Pauly says in his "proof of loss" (which is evidence, fol. 29–30, as already observed), that being advised that J. W. Collins was thought to have embezzled, etc., he employed an expert accountant to enter upon an examination of the books

of the bank, that "*such investigation*" showed the acts of Collins in question (fols. 497, 422).

This expert was Sparks (fol. 297).

Now we know that he did not employ Sparks until the first of April, and that Sparks was in his employ until the first of June (fols. 257–8). The payments to Sparks show this beyond question. Sparks went to work the first of April upon Collins' account, and, with Bloodgood assisting him, they "worked all the time constantly and worked hard" (fol. 257); discovered these acts of Collins some time in May (fol. 258). They embodied a description of these acts in a written report to Mr. Pauly, which they gave to him shortly before the twenty-third of May (fol. 260). This report is printed at folios 482–490. It describes the acts in question (fols. 486–7).

We say that this was how and when first Mr. Pauly made his discovery.

The only evidence to the contrary is a statement in the original bill of particulars. As this was at first drawn it mistakenly stated that the acts were discovered during February and March. Under the rule of the court Mr. Pauly was required to verify the bill of particulars, and did so. We amended this upon the trial (fol. 150), but the plaintiff in error put the original statement in evidence as a declaration of Mr. Pauly (fols. 364–5).

And it is all the evidence upon this issue which they have got.

Of course the verdict has settled it.

Mr. Bloodgood on his cross-examination is made to say certain things about some of the items, which may or may not have been those in question, as of January or February which he corrected afterwards.

He was then employed in assisting Mr. Pauly in preparing his report to the comptroller. Had the plaintiff in error printed that report, which is in the bill of exceptions (fol. 363), it would intelligibly appear what he was talking about. As it is it does not so appear. The report would probably have to show what certificates were outstanding, and would therefore require the checking up of the certificate book. It would also probably have shown all balances due to and from other banks, and thus would necessitate the examination of the whole of the accounts with the United States National and the Western National, including the items in question—but that would not show that Collins got the money. It would only show that the California National got it.

The remark referred to in the brief, "Charge "Collins and credit United States National Bank" (fol. 287), could not possibly refer to the United States National Bank item in question, because in no aspect could that be credited to the United States National Bank. That bank had loaned the money and got re-discounted bills of the California National for it, which it collected when they became due. This transaction as far as that bank was concerned was forever closed. The only possible correction for this item would have been, charge Collins and credit *California National.*

As he says, in January and February he merely went over the general books of the bank to prepare the statement of assets and debts, and did not begin upon Collins' account until April (fols. 310–311, 294–295, 298).

However this may be, he certainly gave the following testimony:

"I discovered those items that you mentioned "towards the end of May" (fol. 259).

"At that time we discovered others. We dis- "covered that credits to Collins' account were on "the bank's guarantee and endorsement of the "bank" (fol. 259).

"Those items were not discussed between Mr. "Pauly and myself while his report was being "made up, only in a general way. He told me to "take that list and check up and see whether it "corresponded. *We didn't know anything about* "*it.*

"*Mr. Wilcox:* Now, I should like to read what "those items were, so that we shall know what the "witness meant when he said the items were dis- "cussed?

"Q. But they relate to these transactions? A. "Yes, sir.

"Q. But they related to these transactions?

"Q. To this $7,500 certificate?

"Q. To the $20,000 item of the Western National "Bank of New York?

"Q. To the $25,000 item of the United States "National Bank of New York?

"Q. To the $10,000 item of the First National "Bank of Chicago?

"Q. And to the other $10,000 of the Western "National Bank of New York?

"*The Witness:* Those items were not discussed "between Mr. Pauly and myself, except in a "general way, he telling me to take that list and "check it up to see whether it corresponded.

"Q. It was discussed in a general way, you say?

"A. *We didn't know anything about it*" (fols. 281–3).

"There was no suspicion in my mind that these "ought to have been charged to Collins. *I did* "*not know anything about it at that time*" (fol. 287).

So that even if he had elsewhere said things to the contrary, the matter would have to go to the jury. It did so go, and the jury has believed the above quoted testimony.

But however this may be—no matter what he himself may have known—he did not tell Mr. Pauly (fol 287). "Nothing at all was said about "it between Mr. Pauly and myself." So that *Mr. Pauly* certainly did not make the discovery, whatever Bloodgood may have done.

It is apparent that for the discovery to be made by anybody the following things must all be known: The loan by the Western National to the California Bank, and the putting of the money loaned to the credit of that bank.

The deposit of the same amount to the credit of Collins.

Knowledge of these facts alone could not occasion the discovery, because it would not appear but what Collins had deposited gold or anything else.

The deposit tag, coupled with the fact that a telegram had passed from Collins to the cashier, is the vital evidence. That shows that the money put to Collins' credit was the Western National money.

In order to prove a discovery by Mr. Pauly, therefore, his knowledge of the deposit tag and the fact that there was a telegram must be shown as well as the loan and the credit, and it must be shown, too, that he knew them all at the same time, so that his attention would be drawn to their connection with each other.

Now, the deposit tag was discovered in May (fol. 259).

"*By the Court:* Q. Do you mean to say that "you had seen and examined the deposit slip "which referred to these transactions of October "13th and 14th, and October 31st, in January? "A. *No;* I took that statement and checked this "account from that statement" (fol. 293).

"When I just testified that those slips were be-"fore me when I made that examination, I was "misled. I may have said so, but I did not under-"stand the question right" (fol. 299).

It does not appear when Mr. Pauly first knew of the fact of the telegram.

It is submitted that the whole matter is a question of fact, which the verdict of the jury has settled.

The question whether Mr. Pauly notified the plaintiff of any act which *may* involve loss "as soon as practicable" is also a question of fact which the verdict has disposed of.

So far as we know there were no such acts except those in issue in this action, and fully discussed above.

The remaining question raised here is as to whether the discovery was made within six months from the "retirement" of the employee from the service of the employer. The argument is that the bank examiner took possession of the assets of the bank on the twelfth of November, and Mr. Pauly did not make his discovery until after the twelfth of May.

The first answer is that the action of the bank examiner certainly did not "retire Collins" from the service of the bank. He was still president,

and continued to be so until his death, on the third of March. Suppose the bank examiner had restored the assets to the bank, would not Collins have still been president?

Mr. Pauly's taking possession—twenty-ninth of December—is too late for this purpose.

But again the jury could, from the evidence, have found that the discovery was made during any day in May—the eleventh for instance—(fols. 257–259), and if that be necessary to sustain the verdict, it has done so.

6. *No fraud or dishonesty on the part of Collins was shown.*

This is on the theory that the account of Collins was used constantly for the benefit of the bank, and, *therefore*, "the inference becomes absolutely "inadmissible (based merely upon the account "itself), that any item in that account represents "a transaction in which Collins used bank moneys "for his own benefit. Any given entry may rep- "resent a Collins transaction, or it may represent "a bank transaction, and this uncertainty *the* "*account itself* is wholly insufficient to clear up."

We had proved that Collins had drawn out all the money. This argument is *that we must prove what he did with it after he had drawn it out.*

In the first place the question as to whether Collins' account was used for bank transactions was one of the issues of fact on which we went to the jury, the trial court charging with the defendant upon that issue (fol. 415), and, of course, the verdict has settled it.

In the next place, assuming that we *have* got to show that it was not used for the bank; *we have*

so shown. Mr. Pauly at the request of the plaintiff in error—sent it to it as early as the eighteenth of July, 1892—a detailed account of all transactions between Collins and the bank, showing that on the eleventh of November, 1891, he owed the bank $374,978.22 (fols. 535–621). *The defendant twice sent its expert to San Diego to investigate this matter. He was given every facility for investigation by Mr. Pauly.* The defendant put that expert upon the stand in the O'Brien case, and we read his testimony, showing the above facts, in this case (fol. 334), *and the result is a criticism on their part of one item of $10,000 out of the $374,978.22* (fols. 325–327). That is all.

The court sent us to the jury on this question, charging with the defendant upon it (fols. 415, 413–14), and the jury has settled it in our favor.

II.

The exceptions to the admission of evidence are the same as in the O'Brien case.

In this connection we call the attention of the Court to a misprint in folio 315—the sentence "We "never had any account of Mr. Collins made up "showing that balance," should be "We never "had any *other* account," etc. O'Brien Record (fol. 383). The evidence in this case was read from the O'Brien case.

The judgment should be affirmed.

EDWARD WINSLOW PAIGE,
Of Counsel.

No. 509 and 510.

Motion papers and for

Office Supreme Court, U. S.
FILED.
OCT 13 1896
JAMES H. MCKENNEY,
CLERK.

U. S. Supreme Court.

Filed Oct. 13, 1896.

AMERICAN SURETY COMPANY,

Plaintiff in Error,

against

FREDERICK N. PAULY, RECEIVER, ETC.

AMERICAN SURETY COMPANY,

Plaintiff in Error,

against

FREDERICK N. PAULY, RECEIVER, ETC.

Notice of Motion to Advance Cases on Docket.

EDWARD WINSLOW PAIGE,

Counsel for Defendant in Error.

September 18, 1896.

Supreme Court of the United States.

OCTOBER TERM, 1896.

AMERICAN SURETY COMPANY, Plaintiff in Error, *against* FREDERICK N. PAULY, Receiver of the California National Bank of San Diego, California, Defendant in Error.	No. 509.
AMERICAN SURETY COMPANY, Plaintiff in Error, *against* FREDERICK N. PAULY, Receiver of the California National Bank of San Diego, California, Defendant in Error.	No. 510.

ON MOTION TO ADVANCE.

Statement.

The plaintiff in error issued to the California National Bank of San Diego, California, its two guarantee bonds insuring that bank against loss occasioned to it by acts of fraud or dishonesty by its President and Cashier—one in the sum of twenty-five thousand dollars and the other in the sum of fifteen thousand dollars.

The defendant in error is the receiver of the property of that bank, and the above actions, brought by him, one upon each bond, have resulted in verdicts for the full amounts insured and interest, being now about fifty thousand dollars. The judgments entered upon these verdicts have been affirmed by the Circuit Court of Appeals for the Second Circuit (72 Fed. Rep., 470, 484), and the American Surety Company has brought both cases here by writ of error.

It appears from the affidavit of the Comptroller of the Currency, herewith submitted, that there are now pending in this Court two actions relating to the same trust, one originally brought by the receiver and the other against him, and that when these four actions are determined the trust can be immediately wound up.

That the creditors are very numerous, and that the recever was originally appointed on the eighteenth of December, 1891, so that the administration of the trust has extended through nearly five years.

The two cases already upon the docket are numbers 201 and 206 of this term.

Reasons.

The administration of the affairs of the bank are delayed, and upon the determination of these two actions and the two already upon the docket it can be directly ended. Its creditors are very numerous.

"The United States are concerned," both by the hampering of the administration of the department of the Comptroller of the Currency and as a creditor.

Notice of this motion has been served upon the counsel for the plaintiff in error, and proof of service filed with the Clerk.

IN THE U. S. SUPREME COURT.

AMERICAN SURETY COMPANY,
Plaintiff in Error,

against

FREDERICK N. PAULY, as Receiver, etc.,
Defendant in Error.

AMERICAN SURETY COMPANY,
Plaintiff in Error,

against

FREDERICK N. PAULY, as Receiver, etc.,
Defendant in Error.

Comes now the defendant in error, by direction of the Comptroller of the Currency, and submits to the Court, by reference to the affidavit of the Comptroller of the Currency filed in support thereof and to the records, that these are cases where the United States are concerned.

And the defendant in error therefore respectfully moves the Court to advance these cases upon the docket and set them down for hearing at such an early day that they will be heard at about the same time as numbers two hundred and one and two hundred and six of October Term of 1896.

SUPREME COURT OF THE UNITED STATES.

AMERICAN SURETY COMPANY,
Plaintiff in Error,

against

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego.

AMERICAN SURETY COMPANY,
Plaintiff in Error,

against

FREDERICK N. PAULY, as Receiver, etc.

DISTRICT OF COLUMBIA, ss.:

JAMES H. ECKELS, being duly sworn, says that he is the Comptroller of the Currency.

That the above actions were brought by the receiver of the California National Bank of San Diego upon two policies made by the plaintiff in error insuring the bank against loss occasioned by acts of fraud or dishonesty done by the president and cashier of said bank. That verdicts aggregating forty thousand dollars and interest were rendered in said actions and judgments entered upon them have been affirmed by the Circuit Court of Appeals, and it is by virtue of writs of error bringing up those judgments that the cases are here.

Affiant further says that there are upon the calendar of this Court two actions, one of which was originally

brought by the receiver and the other against him, and affiant is advised that they will be reached in this Court about January next. That the affairs of this trust are in such a condition that on the determination of the aforesaid four actions the trust can be immediately wound up. That the creditors of the said bank are very numerous, and the receiver of its concerns was first appointed on the eighteenth of December, 1891.

JAMES H. ECKELS.

Sworn before me this eighth September, 1896.

JAS. N. FITZPATRICK,
[L. S.] Notary Public.

SIRS:

The Supreme Court will be moved as aforesaid at the opening of the next term on the second Monday of October, 1896, or as soon thereafter as counsel can be heard.

Yours, etc.,
EDWARD WINSLOW PAIGE,
Counsel for Defendant in Error in both cases.

To WALTER D. DAVIDGE, Esq.,
Corcoran Building, Washington, D. C., and
HENRY C. WILLCOX, Esq.,
100 Broadway, New York City,
Counsel for Plaintiff in Error in both cases.

AMERICAN SURETY COMPANY *v.* PAULY (No. 2).

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 169. Argued January 7, 1898. — Decided April 18, 1898.

This was an action upon a bond guaranteeing a national bank against loss by any act of fraud or dishonesty by its president. The bond was similar in its provisions to the one referred to in the case preceding this, and contained among other provisions the following: "Now, therefore, in consideration," etc., . . . "it is hereby declared and agreed, that subject to the provision herein contained, the company shall, within

three months next after notice, accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer of moneys, securities or other personal property in the possession of the employé, or for the possession of which he is responsible, by any act of fraud or dishonesty, on the part of the employé, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employé from the service of the employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employé, shall be *prima facie* evidence thereof." *Held*,

(1) That this language was susceptible of two constructions, equally reasonable, and that the one most favorable to the insured should be accepted, namely, that the required written statement of loss arising from the fraud or dishonesty of the president of the bank, based upon its accounts, was admissible in evidence, if suit was brought, and was *prima facie* sufficient to establish the loss.

(2) That within the meaning of the bond in suit, the president of the bank remained in its service at least up to the day on which the receiver took possession of books, papers and assets.

THE case is stated in the opinion.

Mr. Henry C. Willcox and *Mr. Walter D. Davidge* for plaintiff in error. *Mr. Walter D. Davidge, Jr.*, was on their brief.

Mr. Edward Winslow Paige for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an action by the receiver of the California National Bank of San Diego, California, upon a bond given July 1, 1891, by the American Surety Company of New York, to indemnify that banking association against loss by any act of fraud or dishonesty on the part of John W. Collins in connection with the duties of the office or position of president of the above bank, or the duties to which in the employer's (the bank's) service he might be subsequently appointed, and occurring during the continuance of the bond, "and dis-

covered during said continuance or within six months thereafter and within six months from the death or dismissal or retirement of the employé [Collins] from the service of the employer."

The bond in this case is similar to the bond of the Surety Company, of like date, insuring the fidelity and integrity of George N. O'Brien, as cashier of the bank, and which was involved in the preceding case of *American Surety Co.* v. *Pauly* (No. 1), *ante*, 133. With a few exceptions the questions of law raised by the assignments of error in the present case are concluded by what was determined in that case.

1. It is contended that the receiver did not comply with the provision in the bond requiring written notice to the company "of any act on the part of the employé, which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer." The import of this provision was considered in the former case. The material inquiry here is whether notice was given to the company of the acts of fraud and dishonesty on the part of Collins of which complaint is made as soon as practicable after the occurrence of such acts came to the knowledge of the receiver.

The evidence was very conflicting as to the time when the receiver first became aware of the fraudulent acts of Collins as president of the bank. The first written notice by the receiver to the company of any claim under Collins' bond arising out of fraudulent or dishonest acts on his part was given May 23, 1892. The terms of that notice appear in the opinion in the former case. There was evidence tending to show that, although the receiver had reason in the months of January, February, March or April, 1892, to believe that there were irregularities on the part of Collins, as president of the bank, he did not become aware of any specific acts of fraud or dishonesty by him until the expert bookkeeper employed to examine the bank's books informed him a few days prior to May 23, 1892, that he had discovered false entries showing fraud and dishonesty on the part of both Collins and

O'Brien. The conflict in the evidence upon the issue as to the time when the receiver first acquired knowledge of the frauds in question was submitted to the jury under instructions to which in our judgment no objection can properly be made. The court instructed the jury that it was incumbent upon the receiver to satisfy them by a fair preponderance of evidence that he notified the company of any act on the part of Collins "likely to involve a loss for which the company might become responsible as soon as practicable after the act came to his knowledge." It said: "Now, it was not incumbent upon the plaintiff to give notice as soon as practicable after he may have had suspicions of dishonest conduct on the part of the president, but it was his duty when he became satisfied that the president had committed some specific act of fraud or dishonesty which was likely to involve the defendant in loss to give notice in writing. This provision does not require that the notice shall be given immediately, but it requires that it shall be given with reasonable promptness after the discovery, and it is a question of fact for the jury to say upon the evidence, in view of the particular circumstances of the case, whether such a notice has been given with reasonable promptness. The notice in this case was given on the 23d day of May, 1892, and it will become necessary for you to inquire and determine when it was that knowledge came to the plaintiff, when he became chargeable with knowledge that the president had committed some specific act of fraud or dishonesty likely to render the defendant liable upon its bond."

Again: "The testimony of Mr. Bloodgood, you will recall, which, if I remember it correctly, is to the effect that he entered upon the investigation of the facts in reference to the president's accounts and the misapplication of funds by him about the first of April, and completed that investigation some time in May, and as soon as he completed it, he then informed the plaintiff of the result. Now, I will charge you, as matter of law in this case, that if the plaintiff had made discovery of any specific act which he believed might render the defendant liable for loss prior to the first day of May,

1892, the notice was not given with reasonable promptness; but if a discovery was not made until after that time, then you can say and decide as a question of fact, whether or not it was given with reasonable promptness, having been given on the 23d day of May."

These instructions were rather more favorable to the Surety Company than were those on the same point in the suit on the bond guaranteeing the fidelity and integrity of the cashier of the bank.

In our judgment, for the reasons stated in the opinion in the former case, it was proper to instruct the jury that the receiver need not have given the required notice on mere suspicion as to acts by Collins involving fraud or dishonesty on his part as president of the bank, but was bound to do so only when satisfied that he had committed some specific act of fraud or dishonesty likely to involve loss to the company. Nor was it error to leave it to the jury to say whether under the proof, and looking at all the circumstances, a notice given May 23d of a loss discovered after May 1st was given with reasonable promptness.

2. It is insisted that the instructions of the trial court in reference to the effect to be given to the written statement of loss made by the receiver were erroneous. The provision in the bond, upon which this contention rests, is in these words: "Now, therefore, in consideration," etc., . . . "it is hereby declared and agreed, that subject to the provision herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer of moneys, securities or other personal property in the possession of the employé, or for the possession of which he is responsible, by any act of fraud, or dishonesty, on the part of the employé, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continu-

ance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employé from the service of the employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employé, shall be *prima facie* evidence thereof."

The court said to the jury: "Now, there is a provision in the policy to the effect that a written statement of loss, certified by the duly authorized officer or representative of the employer (receiver of the bank in this case) and based upon the accounts of the employer, shall be *prima facie* evidence thereof. In view of that condition of the policy, I instruct you that the plaintiff has established a *prima facie* case against the defendant, because he gave the written statement of loss, and subsequently transmitted to the defendant a copy of the account upon which it was based. Nevertheless, the plaintiff has offered additional evidence. He might have rested his case upon the proof that he had complied with this condition of the policy which I have read to you and insisted then that it was incumbent upon the defendant to show that the bank had not sustained a loss within the terms of the policy. But the plaintiff has seen fit to produce further evidence. I am not going to call your attention to that evidence in any detail. Suffice it to say that it tends to prove that on or about the 13th of October the president of the bank procured a discount of certain notes of the bank with the customers' notes belonging to the bank as collateral, to the amount altogether of about $45,000; that about that time he sent telegrams in cipher to the cashier of the bank at San Diego; that about that time the cashier caused a credit to be given in the president's personal account for items amounting to about $45,000; that when the bank failed the apparent balance to the credit of the president in his private account was about $11,000, showing that he had drawn out about $34,000 of the $45,000 which had been placed to his credit on the 13th or 14th of October. It is insisted that this evidence authorizes and requires you to find that the president obtained

an improper credit, and by means thereof appropriated more than $25,000 of the funds of the bank.

"I shall not allude to the evidence which has been given of other improper credits which it is alleged were given to the president in his personal account with the bank. They are only important as tending to characterize the nature of the transactions of October 13th and 14th, and as tending to show the total loss sustained by the bank through its president. But the question for you to determine is, whether by reason of these improper credits of the 13th and 14th of October the defendant became liable for a loss within the meaning of the terms of the policy. Was that a fraudulent or dishonest transaction on the part of the president? If it was not, the plaintiff is not entitled to recover. If it was a mere irregularity on his part, an honest irregularity, or if he was not aware of the fact that these credit items were passed to his account, the plaintiff is not entitled to recover. You must find that when he drew this money out he knew, or had reason to believe, that these items had been credited to his account; and you must find that in drawing out the money on those credits he was actuated by a fraudulent or dishonest mind. If, upon the evidence in this case, you can come to the conclusion that he believed that if the directors of the bank had known of these transactions they would have acquiesced and regarded them as entirely satisfactory, why, then it is your duty to find that he was not actuated by a dishonest motive, and therefore his acts in appropriating this money were not fraudulent and dishonest. The burden is upon the plaintiff to satisfy you by a fair preponderance of evidence of the truth of this issue. Fraud is not to be legally presumed, and the law presumes that every man acts honestly until the contrary is shown. On the other hand, fraud or dishonesty is a condition of the mind. It is incapable of direct evidence. It must always be found from circumstance. There is no way in which the plaintiff could show in what state of mind Mr. Collins was while these transactions were taking place, unless he could produce him as a witness on the stand and elicit the truth.

"Well, as I have said before, the plaintiff has made a *prima facie* case upon this issue because he has complied with that condition of the policy which prescribes that the written statement of claim shall be *prima facie* evidence of a loss within the terms of the policy. Now, it is for you to say, upon the other evidence in the case, which has been elicited principally upon the cross-examination of the plaintiff's witnesses, whether the defendant has overcome that case. If you conclude that the defendant has overcome that presumption, and, upon all the evidence before you, that the transactions in controversy are as consistent with the theory of honesty on the part of the president as of his dishonesty or fraud, then the defendant will be entitled to your verdict."

The Surety Company insists that the provisions of the bond referring to the written statement of loss relate exclusively to the presentation of the claim to the company and its acceptance or rejection thereof, and not to the use of such statement as independent evidence in any suit brought for the recovery of such loss; in other words, it is argued, the company was willing in its consideration of the claim of loss to accept as *prima facie* proof of the claim the statement of loss, duly certified and based upon the accounts of the employer, but did not waive its right, if sued, to demand such proof as was necessary in law to sustain it. The bond may be susceptible of this construction. But is it not also susceptible of the construction placed upon it by the trial court? If the Surety Company intended that the written statement of loss certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, should be *prima facie* evidence only of the right of the employer to bring suit on the bond if its claim of loss was not paid, it should have so expressly declared. But that was not done. The company agreed to pay any loss covered by the bond within three months next after notice, accompanied by "satisfactory proof of a loss." But that no doubt might arise as to what was satisfactory proof of loss, and that the obligee might be assured of the prompt settlement of any claim it might make under the bond, if accompanied by proper proof of loss,

care was taken to express the understanding that a written statement of such loss, duly certified, "and based upon the accounts of the employer," should be *prima facie* evidence "thereof," that is, *evidence* of "such *loss*." In our judgment, the Circuit Court of Appeals correctly held that the interpretation placed upon the bond by the trial court was the natural one. The company might well have agreed that, in the event of suit, a written statement of loss arising from the fraud or dishonesty of the employé, and "based upon the accounts of the employer," should be sufficient, *nothing appearing to the contrary*, to establish the loss; and this for the reason that such accounts if the claim was disputed and made the subject of suit, would be open to examination by the company. The employer could not base its statement of loss on its own accounts, and then withhold such accounts from inspection by the obligor on the bond.

If the latter construction of the bond be not clearly right, it cannot be said to be inconsistent with its provisions. And it would be going very far to say that the construction given to it by the company was so clearly right that a different construction would be unreasonable or entirely inadmissible. We have then a contract so drawn as to leave room for two constructions of its provisions, either of which, it may be conceded, is reasonable, one favorable to the company, and the other favorable to the bank and most likely to subserve the purposes for which the bond was given. In such a case the terms used must be interpreted most strongly against the party who prepared the bond and delivered it to the party for whose protection it was executed. It has been so held in the case just decided.

3. We have seen that the company agreed to reimburse the bank for loss "by any act of fraud or dishonesty" on the part of Collins as president of the bank in connection with the duties of his office, occurring during the continuance of the bond, and discovered during said continuance or within six months thereafter, *and* within six months from the death or dismissal or retirement of the employé from the service of the employer.

As evidence of the dismissal or retirement of Collins from his position as president of the bank, the company refers to paragraph VI of the original bill of particulars filed by the receiver:

"VI. The following is the date of the dismissal or retirement of said John W. Collins and of the discovery of the acts of fraud or dishonesty referred to as alleged in the ninth paragraph of said complaint:

"'The said J. W. Collins ceased to act as president of the said California National Bank upon the same going into insolvency and coming into the possession of the Comptroller of the Currency of the United States, which took place December 12, 1891; that on the 29th day of December, 1891, Frederick N. Pauly, the plaintiff herein, qualified as the receiver of said bank, and took full possession of its assets under his trust, and that the acts of fraud and dishonesty referred to in paragraph 9 of said complaint were discovered during the months of February and March, 1892.'"

Paragraphs 9, 10 and 11 of the complaint were as follows: "IX. That on or about June 18, 1892, and as soon as practicable after the occurrence of the aforesaid wrongful acts of the said Collins, this plaintiff duly mailed at San Diego, California, in an envelope addressed to the said defendant at its office in the city of New York, a notice, in writing, of the acts of fraud and dishonesty of said Collins, and a written statement of the loss sustained by said bank by reason of the acts of fraud and dishonesty of said Collins, certified by the plaintiff and based upon the accounts of said Collins, and presented satisfactory proofs of the loss sustained by said bank by reason of the acts of said Collins during the continuance of said bond, and duly demanded from this defendant that this defendant make good and reimburse to this plaintiff the sum of twenty-five thousand dollars, the amount of pecuniary loss sustained by said bank by reason of the acts of fraud and dishonesty of said Collins, being the amount conditioned to be paid by the terms of the said guarantee bond heretofore mentioned. X. That the said defendant received each and all of the papers mentioned in paragraph nine of this complaint within at least

ten days after the date of mailing thereof, as alleged in paragraph nine of this complaint. XI. That the said defendant has retained in its possession each and all of the papers mentioned in paragraph nine of this complaint since the receipt thereof by said defendant, and has never up to the time of the commencement of this action objected thereto, either to this plaintiff or to said bank, as not being sufficient as a notice or statement of loss or proof of loss, as provided by the said bond heretofore mentioned, nor has said defendant raised any objection of any kind or nature whatsoever thereto, either to this plaintiff or to the said bank." The following entry appears in the record: "Plaintiff amends his bill of particulars by omitting all of sixth after first paragraph and inserting in lieu thereof, that the date of dismissal or retirement was the first of March, 1892; that the acts of fraud and dishonesty referred to in paragraph 9 of said complaint were discovered between the 1st and 23d of May, 1892; and amends his complaint by striking out paragraphs 10 and 11 and inserting in lieu thereof, that between the 22d day of May, 1892, and the 18th of June, 1892, and again on the 24th of June, 1892, and as soon as practicable after the discovery of the aforesaid wrongful acts of the said Collins, this plaintiff duly notified the defendant in writing at his office in the city of New York, and on the 24th of June, 1892, and as soon as practicable after the discovery of said acts, presented to the defendant a claim in writing for the losses occasioned by such acts of the said J. W. Collins. And the plaintiff has duly performed all the acts and things which the employer in and by said bond was obligated to do; all of which notices and claims were received and accepted by the defendant as in all things sufficient and in time. Plaintiff thereupon duly demanded from defendant that it make good and reimburse to plaintiff the sum of $25,000 and interest towards the amount of pecuniary loss sustained by said plaintiff by said acts."

Independently of the statement in the receiver's original bill of particulars, (which, after being filed, was modified as just stated,) there is no direct evidence in the record that Collins ceased to be president of the bank by any formal act

on his part. He died March 3, 1892. It is true that he does not appear to have performed, or that he attempted to perform, any distinct act as president after the suspension of the bank on November 12, 1891. We have held, in the other case, that the mere suspension of the bank on November 12, 1891, followed by an investigation of its affairs by a national bank examiner, did not have the effect to retire O'Brien from his position as cashier. The same rule must be applied in the case of the president of the bank, whose functions were only suspended while the affairs of the bank were being investigated by a national bank examiner. The Circuit Court of Appeals well said, in support of this view, that if at any time before the receiver took possession on the 29th of December, 1891, the parties interested in the bank had made good its deficit and the bank examiner had restored its assets, no new appointment as president would have been necessary. In the former case there was evidence showing that O'Brien was, in fact, continued in the service of the receiver until about March 2, 1892, and that he claimed compensation for his services. On the day last named he left or retired from that service. There is no evidence in this case that Collins was formally retained by the receiver in his service. But even if, for that reason it were held that he retired from the service of the employer, when the receiver qualified on December 29, 1892, still the six months from the "retirement of the employé from the service of the employer" would not have expired until June 29, 1892. It is sufficient in this case to adjudge that Collins, within the meaning of the bond, was in the service of the bank up at least to the date on which the receiver took possession, and that his fraudulent acts were discovered and notice thereof given within six months after that date. The acts of fraud and dishonesty complained of were discovered a few days prior to May 23, 1892, and notice thereof to the company was given on that day, and was followed by a claim or proof of loss mailed June 24, 1892, and received by the company July 1, 1892. Such are the facts which the verdict of the jury must be taken to have established. And if it be further true, as the verdict imports, that

the notice of May 23, 1892, was given as soon as practicable after the occurrence of the alleged fraudulent acts came to the knowledge of the receiver, then the loss was discovered during the continuance of the bond and "within six months from the . . . retirement of the employé from the service of the employer." And if the bond is to be regarded as having expired upon the death of Collins, it also results that the claim of loss was made within the time required.

The objection that error was committed in admitting in evidence Collins' ledger account, and proof of alleged prior frauds, as well as evidence showing the extent of Collins' indebtedness to the bank, is not well taken. The case was fairly tried, and there is no ground for supposing that any error of law was committed by the trial court.

The judgments of the Circuit Court and of the Circuit Court of Appeals are

Affirmed.

Mr. Justice White, with whom concurred Mr. Justice Shiras and Mr. Justice Peckham, dissenting.

The plaintiff in error was surety on a bond guaranteeing the faithful discharge by Collins of his duties as president of the bank. The object of the suit is to enforce the penalty of the bond, on the ground that the president, whose conduct is guaranteed, had been unfaithful, and hence that the surety had become liable.

On the trial of the cause the court instructed the jury that by the terms of the bond the burden of proof was shifted from the plaintiff (the receiver of the bank) to the defendant (the Surety Company), and that the former was entitled to recover against the latter without making any proof whatever of its claim if it had been shown that a proof of loss made in accordance with certain requisites specified in the bond had been transmitted to the Surety Company; that is to say, the jury were instructed that in case a proof of loss in a particular form had been made, its legal effect was to create a rule of evidence to govern in any litigation as to the

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bond which might thereafter arise between the parties. The result of this conclusion was to hold that the normal rule by which, in judicial proceedings, the burden is cast on a plaintiff to establish his case was dispensed with, and therefore that the Surety Company, when sued under the contract, was called upon to establish the negative fact that it did not owe, and if it did not do so, a verdict was to be rendered against it. These conclusions of the trial court were affirmed by the Court of Appeals, and upon their correctness the validity of the judgment rendered below necessarily depends.

That there may be no mistake as to what was held by the trial court in its charge to the jury and what was decided by the Court of Appeals in affirming that charge, I excerpt passages from the charge of the trial court and the opinion of the appellate court.

In its charge to the jury the trial court said:

"Now, there is a provision in the policy to the effect that a written statement of loss, certified by the duly authorized officer or representative of the employer (receiver of the bank in this case) and based upon the accounts of the employer shall be *prima facie* evidence thereof. In view of that condition of the policy, I instruct you that the plaintiff has established a *prima facie* case against the defendant, because he gave the written statement of loss, and subsequently transmitted to the defendant a copy of the account upon which it was based.

* * * * *

"Well, as I have said before, the plaintiff has made a *prima facie* case upon this issue because he has complied with that condition of the policy which prescribes that the written statement of claim shall be *prima facie* evidence of a loss within the terms of the policy. Now, it is for you to say, upon the other evidence in the case, which has been elicited principally upon the cross-examination of the plaintiff's witnesses, whether the defendant has overcome that case. If you conclude that the defendant has overcome that presumption, and, upon all the evidence before you, that the transactions in controversy are as consistent with the theory of honesty on the part of the

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president as of his dishonesty or fraud, then the defendant will be entitled to your verdict."

The reasoning of the Court of Appeals, in affirming these instructions, was as follows:

"III. The court charged the jury that the 'plaintiff has established a *prima facie* case against the defendant, because he gave the written statement of loss, and subsequently transmitted to the defendant a copy of the account upon which it was based.' To this and to its repetition, in other words, defendant duly excepted.

"This part of the charge was based upon a provision of the bond which reads as follows: 'It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, shall be *prima facie* evidence thereof.'

"It is contended that this does not mean that such statement shall be *prima facie* evidence in an action upon the bond; that 'no such contingency was in the minds of the parties;' that it only refers to a consideration by the company of the question whether it will pay without suit; that it only indicates in what way the preliminary proof of a loss shall be made to the company; but neither the phraseology of the clause, nor its collocation with the rest of the bond, thus restricts its meaning. It is certainly open to the construction put upon it by the trial judge; such construction is a most natural one; nor is there anything extraordinary or startling in an agreement by the company that it pay upon proof in a prescribed form being made to it, nor in its agreeing to accept such proof as *prima facie* sufficient to entitle the insured to a recovery in case of default. Conceding that it is also open to a construction which would confine it as plaintiff in error contends, it would be at least ambiguous, and it is elementary law that all obscurities and ambiguities in a policy of insurance are to be resolved against the underwriter who has himself drafted the instrument. There was no error, therefore, in the charge in the particular complained of."

The opinion of this court just announced affirms the correct-

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ness of the foregoing propositions; and, because it does so, I am unable to give my assent to it.

The necessary effect of the construction given to the contract is to decide that by its terms the receiver of the bank was entitled to recover on the contract of suretyship for an alleged default of the president, whose fidelity the contract guaranteed, *without making any legal proof whatever of the fact of a loss.* This consequence inevitably results from holding that, on its being made to appear that the bank had furnished a formal proof of loss under the contract, it was consequently entitled to recover without any proof of its right to do so. The contract did not require the bank in making the particular form of proof referred to in the bond as acceptable for the consideration of the Surety Company to verify it under oath, nor did it exact that it should be supported by any legal evidence whatever. Hence, by the contract, the bank could fulfil all the requirements referred to in that instrument as to the particular formal proof alluded to by simply making an unsworn statement to the guarantee company of what it claimed to be due, accompanying that statement with excerpts from the books of the bank. But as this mere unsworn statement of claim is now held by the court to constitute, in an action which might thereafter be brought to recover upon the bond, affirmative evidence of the liability of the Surety Company, which casts upon the latter the burden of showing that it did not owe, I submit that the ruling now made is exactly what I understand it to be — that is, a decision that under this contract the regular course of judicial proceedings between parties litigant is overthrown and a new rule is introduced, by which, when demand is made against the Surety Company, the person making the demand is relieved from proving the justice of his claim; and, on the contrary, the person against whom it is made, though called in as a defendant, is compelled as such to affirmatively establish the negative fact that it is not liable. So novel, so extreme, and, as it seems to me, so unjust a result, should not, in my opinion, be maintained unless the terms of the contract unmistakably make that construction necessary. Instead of

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this being the case, I think that not only the letter but the manifest purpose of the contract, as shown by its context, refutes the extreme construction now affixed to it. The provisions of the bond, which are pertinent to the question under consideration, are as follows:

After reciting the parties to the contract, that is, the American Surety Company of New York as party of the first part, Collins, as president of the bank, as party of the second part, and the bank as party of the third part, the bond states the employment of Collins in the capacity of president of the bank, and the application made to the Surety Company to guarantee the faithful performance of his duties. The bond then stipulates as follows:

"Now, therefore, in consideration of the sum of one hundred and twenty-five dollars, lawful money of the United States of America, in hand paid to the company, as a premium for the term of twelve months ending on the first day of July, one thousand eight hundred and ninety-two, at 12 o'clock noon, it is hereby declared and agreed, that subject to the provisions herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof, of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer, of moneys, securities or other personal property in the possession of the employé, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of the employé, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal, or retirement of the employé from the service of the employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, shall be *prima facie* evidence thereof."

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Dissenting Opinion: White, Shiras, Peckham, JJ.

It is, I submit, plainly shown by the foregoing language that the Surety Company reserved the right to decline to admit the validity of and to pay without suit any claim made upon the bond, unless notice of the loss was given accompanied by "satisfactory proof" thereof. The words, "satisfactory proof," must have some meaning. But, in reason, the only effect now given to them is that the proof of loss must have been satisfactory to the one who made it; that is, that the parties to the contract meant to say that, whenever the bank was satisfied it had a claim, the fact of its being so satisfied was sufficient to relieve it of all obligation to prove such claim, and to cast upon the Surety Company the duty of showing that the bank was not warranted in asserting a right to recover. The deduction to which the construction thus referred to leads is a conclusive demonstration of its unsoundness. Indeed, if it were the true one, the words "satisfactory proof" have no place in the contract, for it follows that, if the bank preferred a claim under the bond, it would do so because it was satisfied it had a claim, and, therefore, satisfactory proof of a loss under the construction given to it, if it means anything, means only this, that the bank was to be the sole judge of whether a claim existed in its favor, and that this judgment of the bank in advance in its own favor was to be the determinative rule, controlling not only the mind of the guaranty company, but regulating any judicial proceeding which might thereafter arise concerning the obligations created by the contract. But, manifestly, the words, "after notice, accompanied by satisfactory proof, of loss," referred not to the bank by whom the claim was to be made as the person to whom the proof should be satisfactory, but to the Surety Company against whom the claim might be asserted. In other words, the contract plainly declares that the Surety Company only agrees to pay within three months next after notice accompanied by satisfactory proof of loss, that is, by a proof of loss with which it was satisfied. But it is said that, whatever may be the meaning of the particular clause in the contract to which I have just referred, it is controlled by the concluding sentence found in the excerpt which has been made

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from the bond. Between the sentences relating to the satisfactory proof of a loss and that relied upon, the contract contains an enumeration of the character of acts which the bond is intended to guarantee against, and affixes certain limitations of time within which the acts therein referred to must have been discovered. These stipulations intervening between the one as to satisfactory proof and the one relied upon as modifying or controlling the former, bear no relation to the matter under consideration, and, therefore, may be omitted from view for the purposes of the question in hand. To test, then, the correctness of the construction now upheld I eliminate these intervening stipulations and bring into juxtaposition the provision as to satisfactory proof and the subsequent language which it is claimed destroys the legal effect of the prior clause. The contract thus arranged would then read as follows:

"The company shall within three months next after notice, accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer. . . . It being understood that written statement of such loss certified by the duly authorized officer or representative of the employer and based upon the accounts of the employer shall be *prima facie* evidence thereof."

Construing the whole of this clause, it strikes me that its purport is free from real difficulty. The first provision reserves a full right to the company to reject a claim provided the proof is not satisfactory to it of the fact of the loss; the second provision stipulates that the company is bound to treat a statement made in a particular form as being presumptive evidence which must be considered by it in arriving at a conclusion as to whether the loss itself was established to its satisfaction. In other words, the one provision, that of satisfactory proof of a loss, refers to the state of mind of the corporation which is to result from the proof in order that it may admit the validity of the claim without suit; the second relates merely to the form in which a claim may be preferred, and provides that if it is preferred in that form the company

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shall be put to a decision as to whether its substantive effect as evidence is satisfactory to it. Consider also the object of the stipulation. The ninety days for voluntary payment of the claim could only begin to run after the furnishing of the proof of loss. The company, however, had a right to pass upon the sufficiency of such proof, not merely as to form, but as to its probative effect, whether it constituted satisfactory evidence of the liability of the Surety Company or not; and in order to exclude all question as to the period when this time should commence, a stipulation was inserted that proof presented in a particular form would be accepted as *prima facie* or presumptive evidence of the fact of a loss. The stipulation, therefore, that a particular form of proof when furnished to the company should be *prima facie* evidence, did not amount to a declaration by the company that it would also be "satisfactory proof" within the meaning of the previous clause. To say that it did would be to give to the words "*prima facie*" the meaning of "conclusive." Can it be doubted that under the contract the company would have had a right to call upon the bank to make a sworn statement or comply with other reasonable requirements, although the bank had made the formal statement referred to? Clearly not, I submit. In other words, then, the Surety Company, despite the receipt of the written statement referred to, retained the right to determine whether it satisfactorily proved or established the fact of a loss. The difference between the two clauses is that which must ever exist between form and substance, and the failure to appreciate this fact is exemplified in the reasoning of the Court of Appeals, where it was declared that the provision as to "satisfactory proof" amounted to an agreement by the Surety Company that it would pay "upon proof in a prescribed form being made to it," and that the stipulation as to the furnishing of a written statement based upon the accounts of the bank was an agreement "to accept such proof as *prima facie* sufficient to entitle the insured to a recovery in case of default." And the necessary consequence of this ruling was to hold that the right to judge whether there had been a loss under the contract was taken

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away from the company, and that it was bound to make a voluntary payment upon the mere unsworn statement of the party making the claim based upon the accounts of the bank, even though, upon investigation, it developed that the accounts of the bank were utterly unreliable and manifestly insufficient as the foundation of a claim.

It being in reason unquestionable that the company only agreed to pay without suit in case the evidence presented to it was satisfactory *as proof*, can it be held that its agreement that a certain form of proof should be treated by it in its consideration of the claim as *prima facie* evidence of the loss, constituted a contract to accept the designated form as proof, having the effect to overthrow the previous express stipulation and as denying the right of the Surety Company to decline to pay without suit if the proof in its opinion did not satisfactorily establish the loss? In other words, that the implied stipulation, that a certain class of proof when tendered to the company for the exercise of its judgment should be treated as sufficient in form, should be construed as meaning that it should be regarded as adequate in substance, and as establishing a right to payment of the loss.

As I have said, it seems to me the two provisions of the bond are harmonious, and are susceptible of a construction which will give a fair and reasonable effect to both. They ought not, therefore, to be so construed as not only to make the one destroy the other, but so as to give a significance to the contract never intended by the parties, and thereby to overthrow the elementary rule governing all judicial proceedings, that is, that upon the one who makes a claim there rests the burden of establishing it.

That the parties did not intend by the contract to create a rule of evidence to govern any suit which might arise on the bond is in addition shown by another and subsequent provision of the contract, wherein it is stated that an action or suit to recover upon the bond shall be barred if not brought within a year from the presentation of the claim. If the purpose of the contracting parties had been to regulate and control subsequent proceedings in the courts growing out of the

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contract, the natural place to have expressed that purpose would have been in the clause of the contract treating of actions upon the bond. But no such stipulation is therein found.

It is, of course, unquestioned that many authorities hold that where there is an ambiguity in a contract of insurance a reasonable doubt as to its construction will be resolved in favor of the insured, because the policy is presumed to have been drawn by the officers or agents of the insurer. But granting *arguendo* that this rule applies to a contract of suretyship of the character of that under consideration, I know of no case which pushes the principle to the extent of holding that the express provisions of a contract must be destroyed and thereby a liability be enforced against the insurer, not in harmony with the contract, in conflict with its spirit, in violation of the manifest intention of the parties and productive of great injustice. In other words, that where by the express terms of a contract the insurer agrees to pay without litigation only where the proof of the validity of the claim is satisfactory to him, that it is to be held that because he has declared that in making up his judgment as to whether the evidence is satisfactory he will treat a statement of the loss certified by the claimant as *prima facie* evidence, he thereby renounces his right to form a judgment as to the satisfactory nature of that evidence. Indeed, the doctrine goes not only to the extent of depriving the insurer of his right to pass judgment upon the evidence submitted, but it causes the contract to operate beyond the minds of the contracting parties and to control the judgment of any judicial tribunal subsequently called to pass upon a controversy arising upon the bond. Does not this follow from the fact that it is declared that the stipulation that a statement made by the claimant in a particular form shall be *prima facie* evidence, not only nullifies the provision that the whole proof must be satisfactory to the person against whom the claim is made, but also compels a court to say that although no legal proof whatever under the rules of evidence has been offered at the trial on behalf of the claimant, yet that the liability of

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the defendant has been established, and there must be a judgment against him, unless he conclusively shows that no loss had been sustained by the plaintiffs.

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